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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 163

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,

and

DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Intervenor-Appellants,

v.

RINGSBY TRUCK LINES, INC., et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

ARTHUR A. ARSHAM
149 Broadway
New York, N.Y. 10006

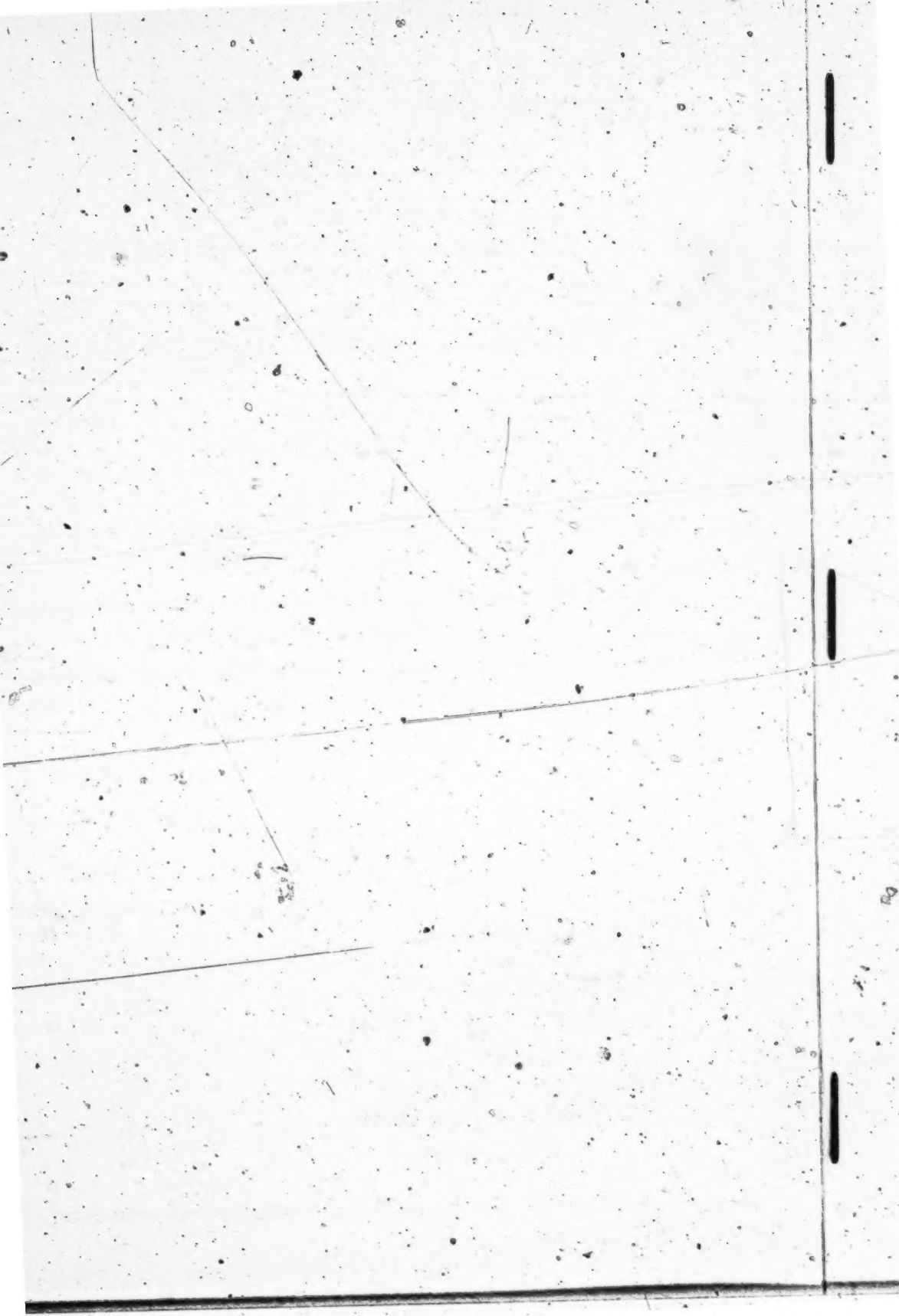
JOHN J. C. MARTIN
685 Third Avenue
New York, N.Y. 10017

Attorneys for Appellants

EDWIN L. SPANGLER, JR.
MAX L. WYMORE
1700 Broadway
Denver, Colorado 80203

TILLY & GRAVES
830 Capitol Life Center
Denver, Colorado 80203

Of Counsel.



INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	4
Statement	5
The Questions Are Substantial	9
1. The Restraining Order	9
2. The Undecided Motions	14
3. Standards of Proof	17
Conclusion	20

APPENDIX A—Memorandum Opinion of District Court.

APPENDIX B—Report and Order of the Commission.

APPENDIX C—Report and Order of the Commission on Reconsideration.

APPENDIX D—*Middlewest Motor Freight Bureau v. United States*—Decision on Motion for Interlocutory Injunction.

TABLE OF CASES CITED

	PAGE
Accelerated Transport-Pony Express v. *United States*, 227 F. Supp. 815	16
Consolidated Freightways v. *United States* (W.D. Washington, N.D.)	12, 16
I.C.C. v. *Hudson Transportation*, 174 F. Supp. 373	13
Middlewest Motor Freight Bureau v. *United States* (D.C. Minn. 4th Div.)	11, 12, 16, D1
Southern Ry. Co. v. *State of North Carolina*, 376 U.S. 93	2
Southern Tank Lines v. *United States* (W.D. Kentucky, C. A. No. 5130)	15
Tanner Motor Livery, Ltd. v. *Avis, Inc.*, 316 F. 2d 804	13
United States v. *Drum*, 368 U.S. 370	2
United States v. *Morgan*, 313 U.S. 409	15
Virginia Petroleum Job Association v. *Federal Power Commission*, 259 F. 2d 921	10
Yakus v. *United States*, 321 U.S. 414	16

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JURISDICTIONAL STATEMENT

Appellants are shipper leagues who intervened on the side of defendants in the action below and appeal from the judgment of the District Court setting aside an order of the Interstate Commerce Commission. Appellants submit that the Supreme Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the District Court is reported at 263 F. Supp. 552. The report of the Interstate Commerce Commission is printed at 326 I.C.C. 397. This

contains the Commission decision of April 15, 1966, under review by the District Court. A report on reconsideration was issued by the Commission on February 1, 1967. This supplemented and affirmed the prior decision. The District Court's opinion is attached as Appendix A, the Commission's report of April 15, 1966, as Appendix B, the Commission's report of February 1, 1967, as Appendix C.

Jurisdiction

This action was brought by the motor carrier plaintiffs under 28 U.S.C. 1336, 1398, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission. The three-judge District Court entered judgment on January 5, 1967 setting aside the Commission's order. Notice of appeal was filed in that court on March 6, 1967. The jurisdiction of the Supreme Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *Southern Ry. Co.* v. *State of North Carolina,* 376 U.S. 93; *United States* v. *Drum,* 368 U.S. 370.

Statutes Involved

28 U.S.C. 2284 provides:

> THREE-JUDGE DISTRICT COURT; COMPOSITION; PROCEDURE
>
> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided

by law, shall be as follows: [(1) and (2) not relevant]

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

Section 10 of the Administrative Procedure Act (5 U.S.C. 1009) provides:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—[(a), (b) and (c) not relevant]

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for

certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Questions Presented

The Interstate Commerce Commission, after investigation and hearing, ordered motor carrier schedules effecting a general increase in rates cancelled for failure of the carriers to adduce evidence requisite to support findings that the increased rates were just and reasonable. A restraint on operation of the Commission's order imposed by a single District Court judge was permitted to remain in effect from September 9, 1966, to January 5, 1967, with no ruling by the three-judge Court on appellants' motion to dissolve or appellees' application for interlocutory injunction. On January 5, 1967, the three-judge Court set aside the Commission's order. The questions presented are these:

1. Did the District Court contravene 28 U.S.C. 2284 and 5 U.S.C. 1009 by compelling the maintenance in force of increase schedules ordered cancelled by the Commission when a restraint on the Commission's order was not required to prevent irreparable damage or to preserve status or rights pending conclusion of the review proceeding?

2. Did the District Court exceed the proper function of a reviewing court by superseding the Commission's judgment of the evidence submitted by the carriers with the Court's evaluation of the

evidence on the basis of standards no longer in effect.

3. Did the District Court err in setting aside the order of the Commission as unsupported by sufficient findings of fact?

Statement

In a report and order issued April 15, 1966, the Interstate Commerce Commission found a general increase of 3 percent in motor carrier rates in Transcontinental territory not shown to be just and reasonable and directed cancellation of the increase tariffs. Fifteen of the affected motor carriers (some 1400 participated in the tariffs) brought suit before the three-judge Court to set aside the Commission's order.

The Commission's decision was based on observed deficiencies in the carriers' evidence deemed fatal to their case. The carriers had submitted cost and traffic studies for the purpose of showing that increases in operating expense justified the increases in rates. These studies were constructed from data supplied by 18 carriers. They were offered as true as well for 1400 carriers who made up the universe of territorial carriers participating in the increase tariffs. The traffic study (also drawn from the 18 carriers) was derived from one week's truckload movements and one day's less-truckload shipments. It was offered as true as well for a full year's operations. The Commission stated that, in order to reflect reliably the conditions of operation and cost in the territory, carriers selected for inclusion in the study group had to be shown to be

representative of carriers as a whole operating in the territory. Similarly, the time interval selected for study had to be shown typical of the entire period. More than a year before these increases were published, the Commission had admonished the carriers in the involved Transcontinental territory that it was not satisfied with the quantum of evidence produced in such cases (319 I.C.C. 792, 803). In this very proceeding, immediately upon instituting investigation, the Commission issued an order calling on the carriers to submit "actual cost and revenue data and operating ratios specifically related to the traffic and territories involved". The same order required the carriers to adduce "detailed data to establish the representative nature of the carriers used", and that "the periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound". The Commission found that the study carriers had not been shown to be representative and the study period had not been shown typical. Some witnesses for the carriers had declared that the carriers selected and the time intervals used were representative, but no evidentiary showing had been made of the method of selecting the carriers; of tests made or statistical standards observed to assure that the selection of carriers was representative and the choice of the time intervals typical of conditions as a whole in the territory. Moreover, data submitted by the carriers as to their financial ratios was deemed inadequate to permit a finding of need for added revenues.

The Commission concluded that the carriers had failed to present competent and substantial evidence

in discharge of their statutory burden of proof. It held that a need for added revenues and the extent of such a need had not been established and that the general increase was not shown to be just and reasonable. The Commission ordered the increase tariffs cancelled and, after denying the carriers' reconsideration petition, fixed September 12, 1966, as the compliance date.

Fifteen carriers (of the 1400 tariff participants) now brought suit in the court below and moved to restrain operation of the Commission's order of cancellation. On September 9, 1966, a single judge, acting prior to formation of the three-judge Court, granted a temporary restraining order over the opposition of the Government and shipper interests. The motor carrier applicants were not required to post the security provided in Rule 65(b) of the Rules of Civil Procedure. On September 20, 1966, appellants (2 national associations of shippers and receivers of freight) submitted to the Court a motion for leave to intervene in defense of the Commission's order; a motion to dissolve the temporary restraining order; a motion to require a bond; a motion for an order to protect shippers and receivers of freight from irreparable loss should the Commission's order be found to have been wrongfully restrained. None of these motions was acted on until October 11, 1966. On that date, the three-judge Court granted the appellant shipper leagues leave to intervene and their answer to the complaint, including a counterclaim, was ordered filed. All other motions, including the motion to dissolve the temporary restraining order and plaintiffs' application for interlocutory injunction, remained undecided, the Court

stating that they would be heard on November 4, 1966, when trial on the merits would be had. None of these motions was in fact ever disposed of nor was appellants' counterclaim determined. The temporary restraint of the Commission's order was kept in force to the date of hearing on November 4, 1966 and continued in force to January 5, 1967 when the three-judge Court issued its decision on the merits. The Court stated that evidence as to the representative nature of carriers used for the cost and traffic studies was substantially the same as evidence held sufficient in cases decided between 1949 and 1963 and that the Commission had previously upheld studies in which the period was as short or shorter than that used in the present case, citing cases decided in 1949, 1952, and 1962. It stated that the Commission had departed from the standards of proof required in earlier cases and had failed to point out specifically in what respects the carriers fell short. The Court concluded that the Commission's findings and reasoning were insufficient to justify its holding. It set aside the Commission's order and remanded the matter.

On February 1, 1967, the Commission responded to the remand with a report which supplemented the earlier report and affirmed the prior decision. It ordered the increase tariffs cancelled by March 10, 1967 but postponed that compliance date should the carriers file complaint in court for further review. Such a complaint was filed on February 27, 1967 in the same District Court and the same three-judge Court was constituted on March 2, 1967.

The Questions Are Substantial

The questions raised by this appeal probe the fundamental relation of administrative agency and reviewing court as they interact in general increase proceedings. Such cases, by definition, are of sharp impact and sweeping territorial effect. They generate difficult problems of proof, as well as of law. Questions as to standards of proof and the power of the agency to formulate and apply them are of the utmost significance in this sector of transport regulation. They merit decisive resolution.

Broad-gauged as such issues are, they are equaled or exceeded in importance by questions that have been extruded in the very process of invoking judicial review of agency action in a general increase proceeding. These questions involve fundamental rights of shipper and carrier, when Commission orders are sought to be restrained, with respect to the subject of agency action—collection of the rate increases. Pressing issues in this sphere have not previously reached the Supreme Court. The action of the court below is in conflict with decisions of other district courts. Such conflicts urgently call for resolution in the context of the present turbulent and formative period in motor carrier ratemaking.

1. The Restraining Order

An ineluctable condition is attached to the extraordinary remedy of temporary or interlocutory restraint—the prevention of irreparable damage. Rule 65 (b) of the Rules of Civil Procedure terms it

"immediate and irreparable injury, loss or damage." In the three-judge reviewing procedure, the condition is stipulated by statute. 28 U.S.C. 2284 (3) makes irreparable damage the prerequisite to grant of a temporary restraining order pending determination of an application for interlocutory injunction. 5 U.S.C. 1009 (d) authorizes the reviewing court, "to the extent necessary to prevent irreparable injury" to issue process to postpone the effective date of agency action or to preserve status or rights pending judicial review. Neither irreparable injury nor the status-rights condition was present here.

There was and is no threat of irreparable injury to the carriers through effectuation of the Commission's order pending judicial review. As the Court of Appeals stated in *Virginia Petroleum Job Association* v. *Federal Power Commission,* 259 F. 2d 921 (4th Cir. 1958):

> "Has the petitioner shown that without such relief, it will be irreparably injured? The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."

The carriers faced no threat of irreparable damage upon effectuation of the Commission's order for the reason that a clear alternative was available to them. If upon cancellation of the increase tariffs, the carriers found a continuing need for added revenues,

they had only to file new tariffs. The Commission's order fixing September 12, 1966 as the compliance date, did not establish or prescribe a rate level. It simply directed cancellation of the increase tariffs. The carriers were and are free to file new tariffs, with rates at any levels they believe justifiable. This prerogative is given to the carriers by statute. Indeed, it is a coherent part of the regulatory plan. 49 U.S.C. 317 vests in the carriers the right to initiate rates and changes in rates by the act of filing new tariffs. Even the order of investigation, issued by the Commission in this proceeding, did not prevent the exercise of that statutory power *pendente lite*. In *Middlewest Motor Freight Bureau* v. *United States* (D.C. Minn. 4th Div., reprinted in Appendix D) the three-judge Court dissolved a temporary restraining order and denied interlocutory injunction. It found (App. D5):

> "That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates."

Carriers in the *Middlewest Case* invoked their privilege and published new increase tariffs within one month after cancellation of the Commission-proscribed tariffs. Although protested by shipper interests, the Commission permitted the new tariffs to become effective and ordered investigation. The revenue yield from the new tariffs was estimated to exceed the yield under the cancelled tariffs. Publication of the new tariffs shielded the carriers from pecuniary injury and

left untouched their right of review in the case pending before the Minnesota District Court which retains jurisdiction of the action.

That the case before the reviewing court is not rendered moot by compliance with the Commission's order of cancellation, and publication of new tariffs, was decided by the three-judge Court in *Consolidated Freightways* v. *United States* (W.D. Washington, N.D.) By its judgment, issued January 26, 1967, the Court ruled "plaintiffs' compliance with the order of the Commission will not render this appellate proceeding moot."

If, as in the *Middlewest Case,* the carriers here complied with the Commission's order and promptly filed new increase tariffs, it could scarcely be claimed that 28 U.S.C. 2284(3) or 5 U.S.C. 1009(d) should provide them with a second bastion against "irreparable" injury. That they have not followed this course, though they could have done so, does not better their claim to injunctive relief. The underlying reason for interlocutory restraint, when carriers are faced with a Commission order, is that the applicants for injunctive relief have no alternative, so that injury threatens to become irreparable. That is not the situation that faces the carriers here. Upon compliance with the Commission's cancellation order, the right to file new increase tariffs provides the carriers with a substantive alternative. This precludes a finding that they are in danger of irreparable injury should the Commission's order of cancellation become effective. In these circumstances, appellants suggest, neither temporary restraining order nor interlocutory injunction may properly be issued under authority of

28 U.S.C. 2284(3) or 5 U.S.C. 1009(d). With respect to the "status or rights" provision of 5 U.S.C. 1009(d), the status to be preserved is the posture of the litigants in relation to the effective rates, as it existed prior to the moment when one of the parties moved to change the rates. This was "the last, uncontested status which preceded the pending controversy" defined as the status quo in many cases. *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F. 2d 804 (9th Cir. 1963); certiorari denied, 375 U.S. 821; *I.C.C.* v. *Hudson Transportation*, 174 F. Supp. 373 (D.C. N.J. 1959). The "pending controversy" is not the action instituted by plaintiff carriers in the court below to set aside the Commission's order. The Court's role is solely that of an appellate tribunal constituted to review a controversy originating before the agency. The "pending controversy" is the contestation before the Commission and the "last uncontested status" is the rate situation as it existed immediately prior to the plaintiff carriers' action in publishing the increase tariffs. Publication of the increase tariffs by the carriers was the affirmative act which set in motion the processes of change. This is made unmistakably clear by the statute's organization of the ratemaking process. The carrier is given the privilege and the right of initiating rates and changes in rates. It is exercised by the act of publishing a tariff (48 U.S.C. 317). That this is the act which effects the significant change in status is confirmed by 49 U.S.C. 316(g). This section provides that "Whenever there shall be filed" a new rate, the Commission may enter on a hearing of its lawfulness. It adds: "at any hearing involving a change in rate . . ., the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable."

Here plaintiffs filed tariffs increasing the rates effective August 1, 1964. The Commission, after investigation, found that plaintiffs had failed to produce evidence requisite to discharge the statutory burden of proof and ordered cancellation of the tariffs by September 12, 1966. In the review proceeding before the Court, the status quo referred to in 5 U.S.C. 1009(d) is that status as it existed just prior to August 1, 1964 and not just prior to September 12, 1966. The Commission's order returned the carriers to their status and the rates as they stood prior to the filing of new tariffs by the carriers which precipitated the pending controversy. The rate situation just prior to August 1, 1964 was clearly "the last uncontested status which preceded the pending controversy."

As for the "rights" referred to in 5 U.S.C. 1009(d) these are clearly the shippers' rights to just and reasonable rates, guaranteed by the Interstate Commerce Act (49 U.S.C. 316(a), (b), (d), (g)). It is that status and those rights that the law looks to preserve. The action of the court below in restraining the Commission's order was, appellants suggest, neither necessary nor appropriate, under Section 5 U.S.C. 1009(d) to preserve status or rights pending conclusion of the review proceeding.

2. The Undecided Motions

The issues considered above were submitted to the three-judge Court by appellants' motion to dissolve the temporary restraining order. At about the same time, a number of alternative motions were submitted to the Court, designed to shield shippers from irreparable injury should an interlocutory injunction

be granted. Thus, appellants filed a motion to require a bond; a motion for an order to protect shippers and receivers of freight from irreparable loss should the Commission's order be found to have been wrongfully restrained; a motion to limit the restraint on the Commission's order so as to operate only with respect to the 15 carriers who were plaintiffs in the action and to leave unaffected the remainder of the 1400 tariff participants who sought neither review nor restraint of the Commission's order. Authoritative support for the relief sought by appellants' motions is found in *United States* v. *Morgan,* 313 U. S. 409, 413 (1941), a case in which the three-judge Court issued a temporary restraining order on condition that the challenged increases be impounded and paid into court. In *Southern Tank Lines* v. *United States (W. D. Kentucky, C. A. No. 5139)* the grant of a restraining order was conditioned on the posting of a bond. In a memorandum opinion, the District Judge stated:

> "Although the Court realizes that no mention of Bond appears in 28 United States Code, Section 2284, the Court finds as a matter of law that an equitable proceeding requesting such extraordinary remedy as a Restraining Order, by a party who alleges that he will receive the ultimate relief sought upon the final determination, requires of him, in equity and protection to all parties who may suffer, the execution of a bond for their benefit and protection."

It is noteworthy that 5 U.S.C. 1009 (d) does deal expressly with conditions to be imposed when a restraint is granted. It provides that process issued by the reviewing Court to postpone the effective date

of agency action shall be "Upon such conditions as may be required and to the extent necessary to prevent irreparable injury." See also *Yakus* v. *United States,* 321 U. S. 414, 440-441 (1943).

None of the appellants' motions were ruled on by the Court below. Indeed, the District Court failed at any time to decide plaintiffs' application for an interlocutory injunction. This in itself contravened 28 U.S.C. 2284(4) which stipulates that an application for interlocutory injunction "shall be given precedence and assigned for a hearing at the earliest practicable date." Without ruling on the application for interlocutory injunction, the three-judge Court kept in force to January 5, 1967, when its decision on the merits was handed down, the temporary restraining order granted by a single judge on September 9, 1966. This operated to deprive appellants of the opportunity to know the grounds on which interlocutory relief was provided and the opportunity to appeal from continued restraint of the Commission's order.

In its handling of the temporary restraining order and the application for interlocutory injunction, the Court below pursued a course that appears in open conflict with decisions of other three-judge courts. See *Accelerated Transport-Pony Express* v. *United States,* 227 F. Supp. 815 (Vt. 1964); *Middlewest Motor Freight Bureau* v. *United States,* supra; *Consolidated Freightways* v. *United States,* supra. All were motor carrier general increase cases in which the Commission ordered tariffs cancelled. In all, the reviewing Courts dissolved temporary restraining

order or denied interlocutory injunction after weighing criteria such as those enumerated in *Virginia Petroleum Job Association* v. *Federal Power Commission*, supra. These included (1) the showing made by applicant of probable success of its appeal; (2) irreparable injury to the applicant; (3) serious adverse effect, through issuance of a stay, on other interested persons; (4) the public interest.

In the instant case, appellants sought by its motions, to invoke these well-settled principles governing grant or denial of restraint on Commission order. Pecuniary effect on shippers of the Court's action may be measured by carrier affidavits submitted in the instant case. Revenues accruing from the increases were estimated to total $29,267 per working day for only 15 of the 1400 carrier partcipants in the tariffs. This reflects as well the extent of the public's cost and the pecuniary impact on shippers of a restraint on the Commission's order that operates to permit the carriers to exact increased rates although found not shown to be just and reasonable. Adverse effect on others and the extent of public interest, if weighed, would surely have militated against the grant of a restraint without the protective condition sought by appellants.

3. Standards of Proof

The Court below appears to concede the Commission's power to set the standards of proof in general increase cases. Yet the Court deemed it "an obvious question", whether the quantum of proof adduced by the carriers in the present case was equal to the proof which the Commission in the past held to be sufficient.

(App. A4) The Court acknowledged (App. A11) that "the Commission is the sole judge of the weight of the evidence before it". But the Court displaced the Commission's evaluation of the worth of the evidence with its own. The Court declared that "the burden of proof is on carriers to show that a proposed rate increase is just and reasonable." (App. A4). But, the Commission's decision that the rate increases were not shown to be just and reasonable, was reversed by the Court on a record incapable of supporting findings that the rate increases were just and reasonable. The Court viewed the major difficulty with the Commission's report to be that the Commission's findings amount to "little more" than the conclusion that the carriers did not sustain their burden of proof (App. A11). But the burden of proof here is not the procedural rule of evidence that allocates burden of persuasion to the party with the affirmative of the issues. Burden of proof in this proceeding is a statutory mandate. 49 U. S. C. 316 (g) makes it the obligation of the carrier "at any hearing involving a change in a rate . . . to show that the proposed changed rate . . . is just and reasonable." This Congressional imperative can neither be evaded by the carriers nor disregarded by the Commission. Indeed, it is the statutory barrier that stands between the carrier's reach and the public purse.

The Commission's finding that plaintiffs' evidence could not suffice was based, not on a demand for evidence of a new type, but on the indispensable ingredient of any sample of some larger whole—that evidence (beyond mere assertion) be adduced to show that the carriers selected are representative of

all and the interval chosen is typical of the full period. Such evidence was totally lacking on the record. Entirely apart from any standards of proof, old or new, the cost and traffic studies to be worth anything at all towards the issues, had to be representative as to carriers and typical as to period. Nothing in the August 3rd order, or in the Commission's standards of proof, changed that. Thus, when the carriers made their study, whenever that was, the minimum requirement of probative utility had to be representativeness and typicality. What the Commission called for was evidence that the carriers selected were representative and the period chosen was typical. What it received were declarations and protestations. The Commission did not demand that the nature of the study be different from what it always was. It laid down no requirement of random sampling. It called for evidence to show that the selection that was made, whether by judgment sampling or by random sampling, was representative and typical. That evidence the carriers failed to supply. Their failure of proof is equally fatal under old standards and under new.

The ultimate paradox is found in a situation where the agency requires affirmative evidence to be sufficient to support affirmative findings, while the reviewing Court is satisfied to accept less. If the Court's view is allowed to prevail, the Commission has been deprived of the power to set standards of proof and the authority to weigh the evidence submitted. Nothing less than this power and authority will suffice if the Commission is to carry out its regulatory functions.

Conclusion

The questions presented on this appeal are substantial. Their resolution is urgently needed to delimit with greater clarity and all possible precision the boundaries of judicial review of agency action in the developing law of motor carrier rate regulation.

Respectfully submitted,

ARTHUR A. ARSHAM
149 Broadway
New York, N.Y. 10006

JOHN J. C. MARTIN
685 Third Avenue
New York, N.Y. 10017
Attorneys for Appellants

EDWIN L. SPANGLER, JR.
MAX L. WYMORE
1700 Broadway
Denver, Colorado 80203

TILLY & GRAVES
830 Capitol Life Center
Denver, Colorado 80203
Of Counsel.

Dated: May 12, 1967

APPENDIX A

Memorandum Opinion of District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action 66–C–467

Jan. 5, 1967

RINGSBY TRUCK LINES, INC., et al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants.

PORTLAND FREIGHT TRAFFIC ASSOCIATION, WEST COAST TRAFFIC COMMITTEE OF THE TOY MANUFACTURERS ASSOCIATION, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., and DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,
Intervening Defendants.

Before BREITENSTEIN, Circuit Judge, and ARRAJ and CHILSON, District Judges.

MEMORANDUM OPINION AND ORDER

ARRAJ, *District Judge.*

This action was instituted by fifteen motor carriers who seek to set aside, annul and enjoin a decision of the Interstate Commerce Commission, entered in

"Increased Class & Commodity Rates, Transcontinental", 326 I.C.C. 397 (1966). In that decision the Commission found that a three per cent rate increase in "transcontinental rates" which had been put into effect in 1964 by 1400 motor carriers had not been shown to be "just and reasonable". The rate increase was therefore canceled by the Commission's order dated April 15, 1966. A petition for reconsideration was denied, and the original order was modified so as not to become effective until September 12, 1966. On September 9, 1966 this Court entered a temporary restraining order preventing the Commission from canceling the rate increase; and on November 4, 1966, following a hearing on an application for an interlocutory or a permanent injunction, the Court ordered that the temporary restraining order remain in effect until final determination by the Court.

We are now prepared to dispose of the matter on the merits. This is a limited administrative review, governed by the terms of the Administrative Procedure Act, Title 5 U.S.C. § 1009, which essentially embodies the "substantial evidence" rule.

As evidence that their rate increase was "just and reasonable", the carriers had prepared traffic and cost studies, designed to reflect their expenses and revenue and need for an increase. The rate was published to go into effect on August 1, 1964. On August 3, 1964 the Commission entered an order requiring that the carriers seeking the increase submit detailed evidence and statistical data supporting their need for the increase.

For preparing the study, the carriers obtained traffic data from eighteen carriers for one week, which

included all bills dated June 19, 1963, and all bills dated June 16-18 and 20-22, 1963 for shipments with a billed weight of 10,000 pounds or more. The cost and traffic studies, and the underlying working papers were deposited with the Commission, and a hearing was held by a Hearing Examiner on November 30, 1964.

The evidence before the Examiner consisted of the studies themselves, testimony by verified statements from the expert transportation consultant who had prepared the study, and from various officials of the carrier companies involved in the increases, as well as verified statements of some protestants. There was also cross-examination of some of those witnesses who had submitted verified statements, including plaintiffs' transportation consultant.

The Hearing Examiner recommended to the Commission that the increase be approved. He specifically found that the study carriers were representative of the entire class affected, that the studies were in all respects proper, and that the carriers had demonstrated their need for additional revenue.

The Commission elected to investigate, rather than suspend, the rate increase, and on April 15, 1966 the Commission entered its report and order finding that the rate increase had not been shown to be just and reasonable and ordering that the rate be canceled. In the report the Commission concluded that the carriers had not sustained their burden of proof, and more specifically that the cost studies could not be given probative value because the carriers selected for the study had not been shown to be representative of the entire group, and the traffic sample (particu-

larly the period selected for the study) had not been shown to be statistically sound. Neither of these grounds had been raised by any of the protestants, who challenged the increase on different grounds.

It is quite clear that the burden of proof is on carriers to show that a proposed rate increase is "just and reasonable", see, e. g., *Accelerated Transport-Pony Express, Inc.*, v. *United States*, 227 F.Supp. 815 (D. Vermont 1964), and, of course, cost studies constitute a necessary ingredient of the proof needed to sustain that burden. The carriers here, however, contend that the evidence adduced by them was in all respects the same type and degree of evidence which has in the past been held to be sufficient to carry the burden of proof in motor carrier rate increase cases. They argue that in holding that the carriers have not met their burden, the Commission is apparently applying new and different standards of proof of which the carriers were not sufficiently apprised.

Certainly when carriers appear before the Commission, they are entitled to know by what standards they are going to be judged. This Court has recognized this basic principle, *Eddleman* v. *United States*, 229 F.Supp. 231 (1964), and indeed the Commission itself has said that "in fairness, standards should not be changed without due notice." *General Increases—Transcontinental*, 319 I.C.C. 792, 803 (1963). See also, *E. Brooke Matlack, Inc.*, v. *United States*, 119 F.Supp. 617 (E.D. Pa. 1954).

An obvious question is whether the quantum of proof adduced by the carriers in the present case was, as they contend, equal to the proof which the Com-

mission has in the past held to be sufficient. The evidence offered to establish that the carriers selected for the study were representative of the entire class of carriers affected by the rate increase consisted of the opinion of the transportation consultant who prepared the study, and the statements of officials of the various companies. On cross-examination the transportation expert explained why he selected the study carriers:

> Yes, one of the peculiarities of the transcontinental traffic is that there are a relatively small number of truck line carriers who participate in the vast majority of the transcontinental traffic. There may be many carriers who originate the traffic and other carriers that terminate it, but these carriers perform the principal transcontinental transportation. In a traffic study of the type here designed since the study carriers reported all of their bills, not merely the traffic they originated, we picked up in the traffic study all of the shipments originated by connections in the East or the West and given to these carriers and all of the traffic which these carriers gave to connections with the East and West for determination. By working with a numerically small group of carriers it was possible to make a comprehensive survey of the entire transcontinental traffic. (Transcript, pp. 60-61).
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> * * * *
>
> I used the term representative in the sense of a group of carriers whose traffic would produce a substantial picture of the transportation char-

acteristics of the transcontinental traffic (Transcript p. 62).

It does appear that in the past the Commission has required no more as evidence of the representatives of the carriers employed in a cost study than the considered judgment of an expert witness. See, e. g., *Cheese Food from Detroit Lakes to Kansas City,* 306 I.C.C. 295 (1959); and *Middle Atlantic Conference* v. *A.A.A. Trucking Corp.,* 302 I.C.C. 499, 510-511 (1957).

While the opinion of an expert need not be accepted as conclusive evidence by the Commission, it is significant that in the present case there was absolutely no countervailing evidence on the question of the representativeness of the carriers selected for the study. In *Davis & Randall, Inc.,* v. *United States,* 219 F.Supp. 673, 678 (W.D. N.Y. 1963), Circuit Judge Friendly disapproved the Commission's view that "even in a proceeding where there is no adversary, it is always free to disregard expert testimony offered by the proponent without communicating its criticisms before decision, so long as it does not rely on 'facts' outside the record." He further noted that:

> Somehow it does not seem consistent with the policy underlying the APA that an agency should be able to reject such testimony on the basis of arguments which the expert never heard and which he might well have been able to answer. Id. at 678-679.

The report of the Commission in the present case contained no finding that the expert witness had been

disbelieved. Therefore, it does appear on the face of it that the Commission has changed its required standards of proof in this regard.

As the carriers point out, for the Commission to conclude that these study carriers are not representative is to some extent to contradict some of their prior holdings, in which most of these same carriers were employed in cost studies. See, e. g., *Transcontinental Motor Rates—Increases,* 49 M.C.C. 211 (1949), *Transcontinental and Rocky Mountain Increases,* 54 M.C.C. 377 (1952); *Transcontinental and Western Increases, 1952,* 61 M.C.C. 755 (1953), *Increases, Transcontinental—Intermountain Coast,* 304 I.C.C. 15 (1958), and *General Increases—Transcontinental,* 319 I.C.C. 792 (1963). The carriers also point to the fact that eight of the eighteen carriers in the present cost study had also been used in a recent study by the Commission itself; this fact also seemed persuasive to the Hearing Examiner. (Hearing Examiner's report, p. 5). The Commission stated, however, that "the inclusion of the additional carriers may or may not distort the picture", 326 I.C.C. at 405; this fact was therefore not impressive with the Commission. It is interesting to note that the Commission *has* in the past pointed to such a fact as evidence of representativeness. See *General Increases—Eastern Central Territory,* 316 I.C.C. 467, 471 (1962). All of these factors suggest that the evidence adduced by the carriers in support of their selection of representative carriers for the study was substantially the same as the evidence which has in the past been held to be sufficient.

The Commission's other ultimate finding was that

the carriers had not demonstrated that the period used for the study was typical for a full year's operation. As previously noted, for the purposes of the study, the eighteen study carriers compiled data for one week, including all bills dated June 19, 1963, and all bills dated June 16-18 and 20-22, 1963 for shipments having a billed weight of 10,000 pounds or more. As to his reason for selecting this period, the expert testified on cross-examination: "The dates selected in June were the earliest possible dates for which the carriers could organize themselves to provide the required data. A week was taken in the middle of June to avoid peaks in traffic. * * *" In his verified statement the expert stated that he felt that the period was representative, and numerous officials of the carrier companies testified that the period was surprisingly typical or normal for their companies.

The Commission has in the past upheld studies in which the period of the study was as short or shorter than that in the present case. See, e. g., *Transcontinental and Rocky Mountain Increases,* 54 M.C.C. 377 (1952); and *Transcontinental Motor Rates—Increases,* 49 M.C.C. 211 (1949). A particularly apposite case is *General Increases—Eastern Central Territory,* 316 I.C.C. 467, 471 (1962), in which the period of the study was quite similar to that in this case. When the representativeness of the period was assailed by protestants, the Commission stated:

> The shippers contend that the sample is not representative of the consist of the total traffic of respondents, and indicate a preference for other sampling methods. The type of sample

> used herein has been found acceptable in numerous prior proceedings. It is clear that the respondents did not choose a particular day or period with a view toward obtaining the result most favorable to their position. * * * The criticism of the sample as such is without merit.

The study before the Commission in that case "was based on all less-than-truckload shipments billed on May 25, 1960, and on all truckload shipments billed on for the 5 day workweek beginning May 23, 1960." The traffic sample in that case was therefore strikingly similar to the sample in the case at bar. There is certainly no evidence in the present record that the carriers chose "a particular day or period with a view toward obtaining the result most favorable." Nonetheless, the Commission concluded that: "The respondents (sic) contention that the period selected is a representative period of time is simply conjecture and begs the real question of establishing this fact." 326 I.C.C. at 405-406. Again it appears that the Commission has departed from the standard of proof which it required in earlier cases. If the carriers have in fact failed to come forth with the amount and types of proof which have *always* been required of carriers seeking a rate increase, the Commission has certainly failed to point out specifically in what respects they fell short.

The carriers contend that this holding of the Commission mirrors not only the Commission's recent dissatisfaction with the long-used method of compiling cost data, but also an insistence that a completely new system of sampling, called random or probability

sampling, be used. We are not prepared to draw such a conclusion from a reading of the Commission's opinion, but if this is, in fact, the unexpressed basis for the Commission's holding, it is quite clear that this would constitute such a radical departure from its former standards that detailed notice should have been given to the carriers.

A report and order of the Commission dated September 29, 1966 and entitled "Motor Carrier Probability Sampling Studies" is a part of the record before us. This report *does* give notice to the carriers that probability sampling methods should be used for future studies, and the Commission itself recognizes the need for giving adequate notice: "[W]e consider the introduction of probability sampling in the preparation of such special reports to be an innovation of such importance as to justify a reasonably comprehensive report * * *." (at p. 4).

If the Commission's preference for this sampling method was the underlying rationale of the Commission's holding in the instant case, it cannot be sustained, for proper notice was not afforded.

> That the Interstate Commerce Commission has the right from time to time to change its policies cannot be questioned. * * * However, where, as here, an applicant relying in good faith upon previously determined standards, as expressed in previous written statements or conclusions of the agencies, acts in strict accordance with such standards, such applicant should not be precluded from an opportunity to meet the revised standards if, without notice, the agency deter-

mines upon new and perhaps more sensitive standards. *E. Brooke Matlack, Inc.*, v. *United States,* 119 F.Supp. 617, 622 (E.D. Pa. 1954).

Defendants place considerable emphasis on the August 3, 1964 order of the Commission in which it was stated that the respondents would be required to submit "detailed data to establish the representative nature of the carriers used". If the Commission's decision was based on a finding that the carriers had not complied with this order, that fact is certainly not readily apparent from a reading of the Commission's report. Significantly, neither the Commission in its opinion, nor the defendants in their argument have suggested what might constitute such "detailed data". It is interesting to observe that in its recent report on the "Motor Carrier Probability Sampling Studies", mentioned supra, the Commission discussed the method of selecting representative carriers for the cost studies, and concluded that "we can find no justification for changing the previously used standards for selecting carriers to participate in the special studies." (p. 16). It appears, therefore, that even the Commission knows of no improved standard for selecting the representative carriers; and under the previously used standard, the selection is left to the informed judgment of the expert preparing the study.

The major difficulty which we encounter in reviewing the opinion of the Commission under the "substantial evidence" rule is that the Commission's findings amount to little more than the conclusion that the carriers did not sustain their burden of proof. It is, of course, true that the Commission is the sole

judge of the weight of the evidence before it, "[b]ut where, as here, the carrier has presented impressive evidence to support the proposed rate, the Commission may not hold the rate unlawful upon the mere statement that the carriers have not sustained their burden of persuasion." *New York Central R. Co.* v. *United States,* 99 F.Supp. 394, 401 (D. Mass. 1951).

> "[W]here, as here, the ultimate finding is negative in form, it need be supported only by 'sufficient basic findings of fact to warrant a reviewing court in concluding that the Commission was not without rational grounds' for holding that burden has not been met." *Chicago & E.I.R.* v. *United States,* 107 F.Supp. 118, 125 (S.D. Ind. 1952), aff'd., 344 U.S. 917, 73 S.Ct. 346, 97 L.Ed. 707 (1952).

The question then is whether the Commission's opinion contains "sufficient basic findings of fact." In concluding that the carriers had not shown the study carriers to be representative of the entire class, the Commission observed that only twelve of the eighteen carriers were shown to have been participating in transcontinental traffic. (p. 405). There was actual evidence by twelve carriers as to what percentage of their total traffic is transcontinental, and the remaining six all had extensive transcontinental rights. The cost study itself took into account the relative participation of each carrier in transcontinental traffic, which presupposes, of course, that all of the carriers were to some extent operating in that traffic. As the carriers point out, the obvious reason why there was no testimonial evidence as to the six

carriers was that they were not asked the question on cross-examination. It was also pointed out that three of these six carriers participated in the Commission's own study; in other words, this observation by the Commission does not afford a "rational ground" for its decision.

The Commission also emphasized the fact that only seven per cent of the total traffic participated in by one of the carriers was transcontinental. This factor is certainly *not* particularly relevant, however, in view of the fact that the studies were *weighted* so as properly to take into account the greater or lesser degree of participation by each study carrier. This is clear from the verified statement of the transportation consultant, and this fact seems to have been recognized at one point by the Commission. (Appendix to the report, 326 I.C.C. at 410).

It is therefore apparent that the findings and reasoning of the Commission are insufficient to justify its holding. Yet it is fundamental that the Commission must " 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962). The report of the Commission simply fails to "articulate any rational connection between the facts found and the choice made", *Burlington Truck Lines, Inc.,* supra, and the matter should therefore be remanded to the Commission for further findings.

A remand is necessary because the Court is unable to determine the real reasons for the Commission's holding—whether the Commission actually

changed the standard in this case from judgment sampling to probability sampling, whether it changed its quantum of proof required, whether the Commission simply did not believe the expert witness for the carriers, or whether the Commission concluded that the carriers did not comply with its procedural order of August 3, 1964. Upon remand the Commission should explain with some detail exactly how the carriers failed to prove their case, and what standards are being applied. Similarly if the Commission concludes that the carriers did not disclose sufficient detailed data, it should explain what type of data it is requiring. If the Commission requires more evidence upon remand, it can, of course, receive it. In any case, if the Commission has no more rationale for its decision than what is contained in its original report and order in 326 I.C.C. 397, this Court cannot affirm.

It is therefore ordered that the Commission's order of April 15, 1966 as modified on July 26, 1966, be vacated and set aside and that this matter be remanded to the Commission for further proceedings in conformity with this opinion.

Served May 9, 1966

30316

INTERSTATE COMMERCE COMMISSION

NO. 34462

INCREASED CLASS & COMMODITY RATES, TRANSCONTINENTAL

Decided April 15, 1966

Increased transcontinental motor common-carrier class and commodity rates and charges found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

LeGrande A. Carlston and *Z. L. Pearson, Jr.*, for respondents.
A. R. Allen, V. A. Bordelon, Dan T. Costello, Frank E. Larwood, Charles C. Miller, A. E. Norrbom, and *Robert J. Stoll*, for protestants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WALRATH, AND BROWN

FREAS, *Commissioner:*

By schedules which became effective on August 1, 1964, the motor common-carrier respondents, parties to tariffs[1] published by the Rocky Mountain Motor Bureau, Inc., hereinafter called the Bureau, established a general 3 percent increase in their transcontinental[2] rates and charges. Excepted from the territorial application of the general increase are (1) rates and charges between points in southern California (south of a southeasterly line from a point north of Los Angeles to the California-Arizona State line), Arizona (except Fredonia, Glen Canyon Dam Site, Littlefield, and Page), and western New Mexico, on the one hand, and on the other, points in Arkansas, Oklahoma, Texas, most of Louisiana, and certain points in Mississippi, eastern New Mexico,

[1] M.F.-I.C.C. Nos. 98, 116, 117, 119, and 135.

[2] The transcontinental rates and charges apply between points lying east and west of a line beginning at El Paso, Tex., and extending northward along U. S. Highway 85 through Albuquerque, N. Mex., Pueblo and Denver, Colo., to Cheyenne, Wyo., thence along U. S. Highway 87 through Casper, Wyo., to the Wyoming-Montana State line, thence along that line to the Wyoming-South Dakota State line, thence northward along the State lines between Montana on the west and South Dakota and North Dakota on the east to the Canadian border.

and Tennessee, and (2) rates and charges between points in southern California and Arizona, on the one hand, and on the other, certain points in Illinois and Missouri, principally Chicago, Ill., and St. Louis, Mo. The first exception is a general exception for all participating carriers. It is occasioned by the refusal of Braswell Freight Lines, Inc., and Braswell Motor Freight Lines, Inc., which serve those areas, to concur in the increase. The second exception is the result of independent action by Braswell Freight Lines, Inc., Braswell Freight Lines, Inc., operator of Warren G. Shayler, W. Thurmond Shayler, Guardian, (Clarinda K. Shayler, Executrix), and Braswell Motor Freight Lines, Inc., to the extent that the transportation moves over the Braswell-Shayler routes. Upon protest of various parties,[3] division 2, acting as an appellate division, by order of July 31, 1964, instituted an investigation without suspension into the lawfulness of such schedules, or as the same may be amended or reissued.

A history of the transcontinental motor carrier rates is briefly summarized in *General Increase-Transcontinental*, 319 I. C. C. 792 (1963). In that proceeding a 6-percent general increase in transcontinental rates and charges established October 15, 1960, except on commodity rates, minimum 10,000 pounds or more, and subject to the same territorial exception as described in (1) above, was approved. mexcept for a general increase in minimum charges per shipment, which became effective November 17, 1962, as amended March 9, 1963,[4] that was the last general increase in the respondents' transcontinental rates and charges. In *General Increase-Transcontinental, supra*, and other proceedings,[5] the Commission noted the recurring attacks on the use of operating ratios as the principal criterion to justify revenue needs. It recognized the weakness of this criterion without a showing of the factors that make up such ratios in light of the changing patterns of motor carrier operations, particularly with respect to carrier-affiliate relationships and transactions and other related matters. Responsive thereto, the Commission indicated that in future

[3] Los Angeles Chamber of Commerce, Portland Freight Traffic Association, Northern California Ports and Terminals Bureau, Inc., West Coast Traffic Committee of the Toy Manufacturers Association, San Francisco Chamber of Commerce, and Oakland Chamber of Commerce.

[4] See Docket No. 34182, *Minimum Charges-Transcontinental Territory*, in which an examiner's recommended report and order approving the increase was affirmed and adopted by order of division 2, dated May 1, 1964.

[5] *General Increase-Middle Atlantic and New England Territories*, 319 I.C.C. 188, decided March 20, 1963, and *General Increases-Eastern-Central Territory*, 316 I.C.C. 467, decided June 14, 1962.

general-increase proceedings where operating ratios are so utilized more detailed evidence and supporting data of the expense items of representative carriers will be expected, and that the studies to be made should reflect the revenues and expenses and and their relationship to the specific traffic on which the increases are to apply.

In the instant proceeding, in order that consideration be given to all such factors whih may bear upon a proper consideration of the lawfulness of the 3-percent increase, the respondents, in the discharge of their burden of proof, were called upon by order of the Commission, August 3, 1964, to include the information and supporting data specified therein, a summary of which is set forth in the appendix, part I. The order further provided for the submission of the direct evidence of the parties in the form of verified statements, with oral hearing for cross-examination and rebuttal.

Evidence supporting the 3-percent increase was submitted by 18[6] motor carrier respondents, listed together with other data in the appendix, part II, certain of which, as indicated therein, have substantial transcontinental operations. Costs were developed by a transportation cost analyst for the respondents. The protestants did not submit cost data. Their principal concern is with the rate differentials enjoyed by shippers located in the territories which were excepted from the increase under rates accorded shippers in the remaining areas. The protestants contend that the increased rates are unjustly discriminatory and unduly preferential and prejudicial in violation of section 216(d) of the Interstate Commerce Act. The Portland Freight Traffic Association and the West Coast Traffic Committee Toy Manufacturers Association also contend that the respondents have not justified the increase. The latter contends that the increase is excessive.

Financial condition of the carriers.—There are approximately 1,400 motor carriers participating in the schedules embracing the 3-percent increase, of which some 821 are class I or class II carriers. The aggregate operating revenues of the class I and class II carriers for the year 1962 and 1963, and for the first

[6] Originally, 28 member carriers of the Bureau were selected so as to include those engaged not only in transcontinental traffic but also inter-mountain coastal, and Rocky Mountain traffic. The elimination of some of these carriers as not being important carriers of transcontinental traffic and the refusal of the two Braswell companies to participate in the study reduced the number of study carriers to 18. Upon the merger of Gillette Motor Transport, Inc., with Western Truck Lines, Ltd., now Western-Gillette, Inc., the number was subsequently reduced to 17 carriers.

six months of 1964 are shown as $3,464,583,589, $3,672,811,423, and $1,857,607,090, respectively, with corresponding aggregate expenses of $3,316,434,507, $3,520,704,682, and $1,775,183,355. Their composite weighted operating ratios before income taxes for the respective periods were 95.7, 95.9, and 95.6 percent. The operating ratios after income taxes were 97.2 percent for both 1962 and 1963. In the absence of complete data for 1964, a comparison of the first six months thereof with the corresponding period for 1963 indicates that the operating ratio at mid-year 1964 slightly improved from 96.5 to 95.6. These ratios are illustrated in greater detail in the appendix, part III. As indicated in the appendix, part II, the weighted average operating ratios of the study carriers in 1962 were 95.3 before income taxes and 96.5 after income taxes. In 1963 the corresponding ratios were 95.1 and 96.4, respectively. Also illustrated in the appendix, part IV, in accordance with the Commission's order, are certain other ratios relating to the financial condition of the study carriers as compiled from their 1963 annual reports. For this group as a whole the ratios were as follows:

	Ratio Percent
1. Ratios of net income to net worth (assets minus liabilities)	
a. Before income taxes	16.32
b. After income taxes	10.89
2. Ratio of net carrier operating income to total carrier operating revenues	4.89
3. Ratios of net income before and after income taxes to total carrier operating revenue	
a. Before income taxes	4.03
b. After income taxes	2.69
4. Ratio of net carrier operating income to net book value of carrier operating property plus net working capital (current assets minus liabilities)	15.05
5. Ratios of net income before and after income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities)	
a. Before income taxes	12.39
b. After income taxes	8.27

Since the publication of the latest previous general increase in their transcontinental rates in 1960 the respondents have been faced with increased operating costs. This is particularly true of labor costs (wage and benefits payments) as a result of new labor contracts covering line-haul and pickup and delivery drivers, terminal, dock, office, and maintenance employees. These contracts became effective February 1, 1964 in 24 central and southern States and July 1, 1964 in 11 western States for a three-year period through 1966. These costs are scaled to become increasingly higher each succeeding year. For example, the projected labor costs of five[7] of the study carriers, for 1964, range from 3.5 to 6.5 percent higher than in 1963. Denver-Chicago indicates that its total increased labor costs projected to year-end 1965 level would be 3.5 percent higher than in 1964. In 1966 the increase would be about 4 percent over 1965. Illinois-California indicates that its total increased labor costs projected to year-end 1965 and 1966 levels would be 7.5 and 11.4 percent, respectively, over 1963. Stressing the impact of additional labor costs, a number[8] of the study carriers point out that such expenses amount to 50 percent or more of their total operating costs and in two instances approximated 57 percent of the carriers' total revenues.

Further testimony of a number of responsible officials of the study carriers is descriptive of management's continuing programs of cost control, replacement of obsolete equipment, and the improvement of facilities to meet the rising costs of operations. The development and improvement for greater efficiency in communications and billing, radio dispatching of pickup and delivery vehicles and the use of electronic data processing equipment, among others, is constantly under management study. In certain instances, for example, multiple terminals have been combined within a single city for improved terminal services, maintenance of equipment, and accounting procedures. With the institution of so-called "doubles-operations" transcontinentally, where warranted, the result is a reduction of expenses and increased payloads. The extent to which such programs

[7]Denver-Chicago Trucking Company, Inc., Garrett Freight Lines, Inc., Illinois-California Express, Inc., United Buckingham Freight Lines, and Watson-Wilson Transportation System, Inc.

[8]Denver-Chicago Trucking Company, Inc., Garrett Freight Lines, Inc., Transcon Lines, and United Buckingham Freight Lines. In the case of Illinois-California Express, Inc., and Consolidated Freightways Corporation of Delaware, the ratio, as indicated, is with respect to their total revenues.

have been implemented by the carriers, generally, is determined by the character and the particular needs of the individual carrier's operation. However, according to the respondents, these and other efforts to increase the operating efficiencies and thereby reduce expenses have not been wholly sufficient to offset the rising costs of operations.

Cost and traffic data.—In ascertaining revenues and expenses to demonstrate the need for the additional revenue provided by the general increase, the respondents developed out of pocket service unit costs for 1963 by updating the unit costs contained in public statement No. 7-60,[9] through the application of the Highway Form B formula to the 1963 annual reports of the study carriers. Traffic data was obtained from surveys simultaneously conducted by the study carriers, for one week, which included all bills dated June 19, 1963 and in addition all bills dated June 16-18 and 20-22, 1963 for shipments having billed weight of 10,000 pounds or more. Each shipment was recorded and tabulated separately by territory with further breakdown as to weight group and type of handling. For the various categories the tabulation revealed the number of shipments, weight (actual and billed), through revenues, reporting carrier's revenue, through hundredweight-miles, and reporting carrier's hundredweight-miles. Service unit and expenses for each carrier were assigned by weight bracket to transcontinental and other traffic in relationship to their participation therein. The accumulation of service units and expenses assigned to transcontinental traffic for all of the study carriers allowed for the development of weighted average unit costs. To permit the trending of these costs to the 1964-level, the study carriers furnished a restatement of their labor costs to reflect the impact on the actual 1963 costs of the contractual and contract related increases known to become effective at year-end 1963, as well as estimates of increases and decreases in other expenses as of the end of such period.

On this basis, respondents compute operating ratios on transcontinental traffic, before income taxes, of 96.2 percent at revenue and expense levels for 1963, and 99.1 percent at the year-end 1964 expense level. A summary follows:

[9] Entitled "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities Performing Transcontinental Service, 1959," prepared by our Cost Finding Section, based on data provided by 8 of the study respondents, as follows: Consolidated Freightways Corporation of Delaware, Denver-Chicago Trucking Company, Inc., Illinois-California Express, Inc., I.M.L. Freight, Inc., Navajo Freight Lines, Inc., Pacific Intermountain Express Co., Ringsby Truck Lines, Inc., and Transcon Lines.

	Revenues		Expenses
1963	$4,669,515	$4,492,462	96.2 percent
1964	$4,669,515 (at 1963-level)	$4,626,786	99.1 percent
	$4,809,600 (increased 3 percent)	$4,626,786	96.2 percent

A comparison of the out-of-pocket service unit costs so developed at the 1963 level, with the same 1959 unit costs updated by our Cost Finding Section as reported in public statement No. 7-64,[10] reveals that both studies show appreciable increases in the unit service costs since the latest previous general increase in respondents' transcontinental rates and charges. The cost study, as analyzed and discussed by the examiner, is summarized in the appendix, part V.

Affiliates.—To illustrate the financial effect of transactions between the study carriers and their affiliates on the operating expenses of the former, the respondents submitted a summary analysis, set out in the appendix, part VI, of affiliate operations during 1963 by the fifteen study carriers having affiliates. The profits of the affiliates were treated as a reduction in the operating expenses of the carriers involved, in the same ratio that payments by the carrier to its affiliates have to the total business of the latter. The effect of the affiliate transaction on the expenses of the carriers is such as to change the composite weighted operating ratio, before income taxes, of the study carriers from 95.1 percent before adjustment for affiliated company transactions to 94.4 percent after such adjustment, a reduction of .7 of one percent.

As pointed out in the recommended report, most of the opposition to the increase stems from the exclusion of the Southern California-southwestern territory areas from the application of the increase, considered necessary under the competitive circumstances. Because of the competition, the examiner found such exclusion not unlawful. *General Increases-Transcontinental, supra.* The examiner concluded that the study carriers were fairly representative of the transcontinental carriers. The examiner further concluded that the average operating ratios of the study carriers for 1963, as shown in the appendix, part II, needed improvement; and that their dealings with affiliates are not the cause of their adverse operating ratios. Ultimately concluding that the respondents established a prima facie showing that the

[10] Entitled "Cost of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities by Regions or Territories for the Year 1963."

increase is reasonable in the circumstances, the examiner found that the 3-percent general increase will not result in rates and charges in excess of the maximum reasonable level, and that they are not otherwise unlawful.

On exceptions, protestants Portland Freight Traffic Association and the Northern California Ports and Terminals Bureau, Inc., in effect, renew their allegations that the increase is unjust and unreasonable in view of the excluded territories and results in undue preference and prejudice. As hereinafter indicated, our findings differ from those of the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

Discussion and conclusions.—No exceptions are taken to the hearing examiner's finding regarding the respondents' cost study which we find to be correct in all material respects. As indicated in the appendix, part IV, unit costs have increased since the last general increase in the rates on transcontinental traffic. However, this fact standing alone is of no significance here. The unit costs must necessarily be applied to a representative sample of the considered traffic in order to determine the revenue needs of the carriers.

As noted, respondents' justification for the general increase rests primarily on a showing of the revenues and expenses, as summarized above, relating to the transcontinental traffic of the study carriers which conducted the traffic surveys and from which operating ratios were computed. Based on this evidence, the respondents conclude that the general increase would reduce the average weighted operating ratio of the study carriers from 99.1 to 96.2 percent at the year-end 1964 revenue and expense levels.

Of controlling importance in this proceeding are whether the carriers selected are shown to be representative and the statistical worth of the traffic sample. When selected carriers are used as a basis for a showing of revenue needs for all respondents, competent testimony must be produced to establish that they are typical of the group as a whole. *Cf., Atchison, T. & S. F. R. Co.* v. *United States*, 225 F. Supp. 584 (D. C. Colo. 1964), and *New York Central R. Co.* v. *United States*, 199 F. Supp. 955 (S. D. N. Y. 1961). Here the respondents have used 18 (now 17) motor carriers claimed to be a representative group, presumably, of about 1,400 motor carriers that participate in transcontinental tariffs. In support of this position, the respondents stress the

fact that 8 of the study carriers were used by the Commission's Cost Finding Section in preparing public statement No. 7-60. However, this does not warrant the finding that the study carriers as a group are typical of transcontinental carriers. While the 8 carriers may be representative of transcontinental carriers, the inclusion of the additional carriers may or may not distort the picture. They also rely on the individual study carriers' participation in transcontinental traffic which, in the case of some carriers, has been described as comprising a substantial share of their respective total traffic. However, participating in the instant traffic has been shown for only 12 of the 18 study carriers. In one of the 12 instances, transcontinental traffic is shown to constitute only 7 percent of the carrier's total traffic. As to the study carriers whose participation in this traffic has not been disclosed, their representativeness is predicated on the fact that all of them, except one, have extensive operating rights between eastern and western transcontinental territory. However, this is not an acceptable substitute for evidence as to traffic movements. Moreover, although the evidence indicates that some of the study carriers transport a substantial quantity of transcontinental traffic, there is no showing as to what proportion of the total transcontinental motor carrier traffic is handled by the study carriers. Clearly, their selection has been indiscriminate. No properly designed method was utilized to select a group of carriers which would be truly representative of all respondents. Because of the lack of evidence in this regard, we must conclude that the respondents have not shown that the 18 study carriers selected are representative.

As indicated, the respondents' traffic data is the result of studies made for one week in June 1963 for shipments of 10,000 pounds or more and one day of the same week for less-than-truckload traffic. On May 27, and 28, 1963, the respondents agreed that the dates selected in June were the earliest days for which the carriers could organize themselves to provide the data. The middle week in June was selected to avoid peaks in traffic. This situation is analogous to those in *L.T.L. Class Rates & Minimum Charges-Midwest & Central*, 325 I.C.C. 106, 111 (1965), and in *Increased Rates, Southwest, Colorado, Wyoming*, 326 I.C.C. 216 (1966), where similar traffic studies were found not to be statistically sound. The same conclusion is warranted here. There is no showing here that the period selected is typical for a full year's operation. The respondents contention that the

period selected is a representative period of time is simply conjecture and begs the real question of establishing this fact. No concerted effort was made to use sampling techniques or to develop data in some other objective manner which if properly designed would have given the proper weight to all the various factors influencing traffic and costs. Lacking any objective evidence in this regard, we are compelled to find that the data obtained from the traffic studies is not statistically sound and of little probative value. In these circumstances, even if we were to assume *arguendo* that the study carriers selected were representative, the respondents' evidence would not warrant the conclusion that the 3-percent increase is just and reasonable.

Moreover, as shown in the appendix, part IV, the respondents introduced various ratios relating to the financial condition of the study carriers. For example, this evidence shows that the average ratio of net income before income taxes ($21,860,806) to the total net worth of the study carriers ($133,920,698)[11] is 16.32 percent. The corresponding ratio of net income after income taxes ($14,582,987) to the net worth is 10.89 percent.

It is not our intention to require carriers to maintain rates at the lowest possible level. On the contrary, we recognize that such action would not be in accord with the objectives of the national transportation policy. Nevertheless, in situations where, as here, carriers are seeking a general increase in their rates the statutory burden is upon them to establish a revenue need for such increase through the presentation of competent and substantial evidence. As indicated, a careful review of the record herein shows that the respondents have failed to meet this burden. In view of our findings herein, we need not consider the contentions of the protestants that the 3-percent general increase is otherwise unlawful.

We find the 3-percent general increase not shown to be just and reasonable.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel on or before June, 1966, the schedules described in the order entered on July 31, 1964, by the Commission, Division 2, acting as an Appellate Division, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

[11] Computed by deducting current liabilities from current assets.

And it is further ordered, That this proceeding be, and it is hereby denied.

By the Commission, division 2.

H. NEIL GARSON
Secretary

(SEAL)

APPENDIX—PART I

Summary of required information and supporting data specified in order of August 3, 1964

The information and supporting data shall include, among other things, actual cost and revenue data and operating ratios specifically related to the traffic and territories involved, overall operating ratios, detailed data to establish the representative nature of the carriers used, and detailed data to disclose carrier-affiliate financial and operating relationships and transactions, and in addition all pertinent evidence and supporting data for the individual representative carriers regarding, but not limited to, the following as they relate to their overall operations and to those specifically relating to the traffic and territories involved:

(1) Ratios of net income before and after income taxes to net worth (assets minus liabilities),

(2) Ratio of net carrier operating income to total carrier operating revenues,

(3) Ratios of net income before and after income taxes to total carrier operating revenues,

(4) Ratio of net carrier operating income to net book value of carrier operating property plus net working capital (current assets minus current liabilities),

(5) Ratios of net income before and after income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities);

The detailed data regarding carrier-affiliate financial and operating relationships and transactions shall include, with respect to any and all individuals, partnerships, and corporations affiliated with respondents, the following information:

1. Name of each affiliate from which respondent, during the year 1963, acquired, leased or purchased lands, buildings, equipment, materials, supplies, parts, tires, tubes, gasoline, oil, or other property or services used by respondent in its operations as a motor common carrier.

2. Kinds of property or service which each affiliate supplied to respondent.

3. Basis of charges for property or services supplied by affiliate to respondent, including the base and rate for rental charges.

4. Total charges by each affiliate to respondent during year 1963 for:

a. Lease of vehicles.

b. Lease of terminals.

c. Lease of other property.

d. Pickup and delivery of shipments.

e. Repair and servicing of vehicles.

f. Management, accounting, financial, legal, purchasing or traffic solicitation services.

g. Property sold by affiliate to respondent.

5. If the affiliate derives revenue from the sale or lease of property or from services through transactions with persons other than respondent, the percentage of the revenue of such business to the total revenue of the affiliate in the year 1963 shall be indicated.

6. A copy of the income statements of each affiliate for the year 1963 and the latest period of 1964 for which a statement is available.

7. A statement listing the amounts of wages, salaries, bonuses, and other compensation paid by the affiliate in 1963 to any individual who is also a respondent or an officer, director, or substantial stockholder of a respondent; or the wife or close relative of a respondent or officer, director, or substantial stockholder of a respondent.

8. The term "affiliate" as used in this order means:

a. Any individual who is also a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent, or of an officer, director, or substantial stockholder of a respondent.

b. Any partnership in which one of the partners is a respondent; an officer, director, or substantial stockholder of a respondent; or the wife or close relative either of a respondent or of an officer, director, or substantial stockholder of a respondent.

c. Any corporation whose stock is wholly or partly owned by a respondent; by an officer, director, or substantial stockholder of a respondent; or by the wife or close relative either of an officer, director, or substantial stockholder of a respondent.

d. Any corporation which exercises control over the operations or finances of respondent.

The traffic studies to be submitted shall be based upon actual operations conducted during identical periods of time for each carrier, and the actual cost studies shall be based upon the operations of the same carriers as used in the traffic studies; and that the periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound;

All of the required data specified shall be based upon and reflect at least the most recent annual reporting period.

Operating data of selected carriers for 1963 and 1963

Carriers (1)	Percentage ratio—transcontinental traffic to total traffic (2)	The Year 1962					The Year 1963				
		Revenues (3)	Expenses (4)	Ratio before income taxes (5)	Income taxes (6)	Ratio after income taxes (7)	Revenues (8)	Expenses (9)	Ratio before income taxes (10)	Income taxes (11)	Ratio after income taxes (12)
Browning Freight Lines, Inc	7	$118,567	$706,726	96.8	$960	96.4	$735,855	$730,390	99.3	$(5,696)	98.5
Consolidated Freightways Corp. of Del	45	85,330,578	84,469,534	99.0	(1,556,099)	97.2	117,433,140	116,881,531	99.7	(502,200)	98.3
Denver Chicago Trucking Company, Inc		43,965,561	40,376,853	91.8	1,506,060	95.3	45,150,366	41,051,217	90.9	1,597,911	94.7
Garrett Freightlines, Inc	20	31,150,614	29,136,409	93.5	674,155	95.7	33,748,695	31,633,115	93.7	851,616	96.2
Gillette Motor Transport, Inc*		8,002,804	7,849,101	94.2	(22,487)	94.0	8,185,500	7,741,780	94.6	15,525	94.6
Illinois-California Express, Inc	60	27,428,803	25,439,683	92.7	703,166	95.3	29,304,651	27,941,604	95.3	640,000	97.5
JML Freight, Inc		36,270,106	33,323,000	88.8	1,307,884	93.5	32,290,346	29,996,986	92.9	1,075,333	96.2
Milne Truck Lines, Inc		6,202,144	5,794,375	93.4	152,196	95.9	6,726,953	6,423,063	95.6	117,017	97.4
Navajo Freight Lines, Inc		50,244,634	28,321,040	96.9	13,000	97.0	30,497,417	29,286,426	96.4	(946,121)	93.3
Pacific Intermountain Express Co	50	65,622,771	61,708,444	94.0	1,208,204	95.8	68,036,327	64,696,407	95.1	500,350	95.8
Ringsby Truck Lines, Inc	50	20,776,072	19,268,656	93.4	509,000	95.8	21,650,967	20,708,069	95.6	447,000	97.7
Rio Grande Motor Way, Inc	20	4,472,212	4,421,975	98.9	1,192	98.9	6,184,954	6,071,538	98.3	53,206	99.0
Texas-Arizona Motor Freight, Inc	50	7,078,621	6,799,649	96.0	162,962	98.3	7,314,355	7,065,056	96.6	53,684	97.7
T.I.M.E. Freight, Inc	34	19,360,790	17,540,081	90.6	316,171	92.2	21,879,715	19,609,565	89.6	561,767	92.6
Transcon Lines	73	26,819,047	23,081,291	87.1	1,454,400	92.5	30,302,989	26,843,460	84.4	2,502,500	92.0
United-Buckingham Freight Lines	20	25,149,283	27,155,501	96.6	(26,931)	96.5	30,003,967	28,572,990	95.2	59,275	95.4
Watson-Wilson Transportation System, Inc	42	48,173,415	48,208,991	104.7	(418,047)	103.7	37,618,055	37,606,055	99.9	0	99.9
Western Truck Lines, Ltd*		14,293,083	14,243,851	99.7	(80,904)	99.2	18,488,433	18,114,308	97.8	53,488	97.8
Totals		469,468,355	466,421,210	96.3	5,903,774	96.5	542,538,679	515,805,576	95.1	7,977,510	96.4

*—Former name was Interstate Motor Lines, Inc.
*On January 1, 1964, Gillette Motor Transport, Inc. was merged into Western Truck Lines, Ltd. and the corporate named Western Trucking, Ltd., changed to Western-Gillette, Inc.

Summary showing the number of class I and class II respondents with operating ratios within designated ranges and showing the weighted average operating ratios of such carriers

Operating ratios	Full Year				First quarter		Second quarter		Total first half	
	1962		1963							
	Before income tax	After income tax	Before income tax	After income tax						
(1)	(2)	(3)	(4)	(5)	1963 (6)	1964 (7)	1963 (8)	1964 (9)	1963 (10)	1964 (11)
100 or higher	108	113	166	167	382	263	143	128	247	175
97 or more, but less that 100	260	350	277	344	172	194	161	127	191	175
95 or more, but less than 97	184	175	146	171	74	106	131	154	118	146
93 or more, but less than 95	108	91	92	68	59	80	122	125	92	100
90 or more, but less than 93	82	85	74	87	57	70	125	115	81	96
85 or more, but less than 90	41	26	43	23	52	42	87	97	68	54
Less than 85	14	7	19	7	24	35	52	36	24	30
Total	797	797	817	817	820	810	821	777	821	776
Composite weighted ratio	95.7	97.2	95.9	97.2	98.7	97.2	94.5	94.0	96.5	95.6

*The variance in the number of class I and class II carriers indicated in the report to approximate 821 is the result of year-end carrier classification adjustments.

Summary of ratios and underlying data for 1963

Line no.	Carriers (1)	Net worth (2)	Net income: Before income taxes (3)	Net income: After income taxes (4)	Carrier operating revenue (5)	Net Carrier operating income (6)	Net book value carrier operating property plus net working capital (7)	Ratio (1): Before income taxes (8)	Ratio (1): After income taxes (9)	Ratio (2) (10)	Ratio (3): Before income taxes (11)	Ratio (3): After income taxes (12)	Ratio (4) (13)	Ratio (5): Before income taxes (14)	Ratio (5): After income taxes (15)
1	Browning Freight Lines, Inc	$65,706	$(3,557)	$2,789	$735,555	$5,448	$108,629	(4.97)	4.02	.74	(.69)	.57	3.36	(1.76)	1.66
2	Consolidated Freightways Corp. of Del	30,293,441	(397,606)	104,556	117,422,140	1,541,306	41,075,906	(1.31)	.36	1.31	(.34)	.09	2.75	(.97)	.26
3	Denver Chicago Trucking Company, Inc	14,122,660	4,130,333	2,482,222	45,150,365	4,060,151	16,485,701	29.22	17.21	9.06	9.15	5.50	24.60	25.05	14.78
4	Garrett Freightlines, Inc	11,063,588	1,906,397	1,074,661	33,749,495	2,116,577	11,381,080	17.23	9.71	5.67	5.65	3.18	18.60	16.75	9.44
5	Gilliote Motor Transport, Inc	2,329,766	316,739	200,114	8,155,500	443,741	4,554,904	13.77	13.09	5.43	3.86	3.67	9.74	6.96	6.56
6	Illinois-California Express, Inc	1,755,555	1,199,504	559,504	29,304,681	2,201,555	2,205,056	68.39	31.11	4.54	4.09	1.91	56.14	55.89	24.67
7	Pfil. Freight, Inc	8,794,950	2,511,023	1,235,670	53,290,546	294,560	10,433,715	28.56	14.06	7.13	7.16	3.53	20.06	23.15	11.84
8	Milne Truck Lines, Inc	1,469,062	254,300	187,365	6,726,053	1,110,956	1,488,066	17.31	9.54	4.55	3.75	2.84	19.75	17.08	9.19
9	Navajo Freight Lines, Inc	17,555,110	647,166	1,555,519	50,467,417	3,555,550	14,996,543	7.53	15.54	5.90	3.03	3.15	14.54	11.06	9.64
10	Pacific Intermountain Express Co	4,079,725	2,567,159	2,155,560	55,055,557	947,556	22,451,577	15.56	13.50	4.50	4.60	3.54	22.55	24.04	15.76
11	Ringsby Truck Lines, Inc	2,539,061	552,564	505,564	21,550,567	118,555	2,474,555	6.01	4.13	1.55	2.75	1.59	4.55	4.59	4.74
12	Rio Grande Motor Way, Inc	771,052	155,244	102,550	7,514,555	549,597	7,577,755	15.54	11.75	5.56	3.05	1.40	20.75	22.56	15.64
13	Tomb-Arizona Motor Freight, Inc	5,157,005	1,575,515	1,117,545	21,575,715	2,155,561	12,055,515	58.04	28.55	15.65	15.51	7.51	30.20	35.07	19.55
14	T.I.M.E. Freight, Inc	5,554,527	4,599,151	2,506,651	50,502,555	4,754,075	11,600,000	11.51	10.77	4.75	5.55	5.47	19.27	9.45	5.56
15	Transcon Lines	9,651,552	1,054,575	1,045,299	50,005,267	1,454,177	5,599,515	(10.25)	(10.25)	.05	(1.22)	(1.25)	19.50	7.05	5.49
16	United-Buckingham Freight Lines	4,542,550	(456,017)	(456,017)	27,015,055	5,455	3,455,255	10.54	5.07	2.45	1.55	1.25	15.05	15.56	5.57
17	Watson-Wilcox Transportation System, Inc	2,555,752	245,150	155,774	15,155,155	571,151									
18	Western Trust Lines, Ltd	155,950,555	21,555,505	12,555,557	545,555,575	26,545,755	175,575,055	16.55	10.55	4.55	4.05	2.55	18.05	15.56	5.57
19	Totals														

1/—Former name was Interstate Motor Lines, Inc.

Source (Annual Report 1963):
Column 2—Schedule 101, lines 45 + 55, or schedule 91, lines 25 + 35.
Column 3—Schedule 2555, line 25, or schedule 255, line 29.
Column 4—Schedule 2555, line 37, or schedule 255, line 31.
Column 5—Schedule 2555, line 5, or schedule 255, line 5.
Column 6—Schedule 2555, line 14, or schedule 255, line 14.
Column 7—Schedule 100, line 21 + 25 plus schedule 100, line 15 minus schedule 101, line 14; or schedule 90, line 15 plus schedule 90, line 10, minus schedule 91, line 9.

Ratios (expressed in percent):
Column 8—Ratio (1) ratio of net income before income taxes to net worth—column 3 ÷ column 2.
Column 9—Ratio (1) ratio of net income after income taxes to net worth—column 4 ÷ column 2.
Column 10—Ratio (2) ratio of net carrier operating income to total carrier operating revenues—column 6 ÷ column 5.
Column 11—Ratio (3) ratio of net income before income taxes to total carrier operating revenues—column 3 ÷ column 5.
Column 12—Ratio (3) ratio of net income after income taxes to total carrier operating revenues—column 4 ÷ column 5.
Column 13—Ratio (4) ratio of net carrier operating income to net book value of carrier operating property plus net working capital (current assets minus current liabilities)—column 6 ÷ column 7.
Column 14—Ratio (5) ratio of net income before income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities)—column 3 ÷ column 7.
Column 15—Ratio (5) ratio of net income after income taxes to net book value of carrier operating property plus net working capital (current assets minus current liabilities)—column 4 ÷ column 7.

APPENDIX—PART V

Examiner's discussion of the traffic survey and related cost analysis

As stated, the traffic survey made by the 18 representative respondents covered the week of June 16-22, 1963, on all shipments having weights of 10,000 pounds or more, and, in addition, all shipments, regardless of weight, for one day, i.e., Wednesday, June 19, 1963. For the purpose of cost analysis, these data were tabulated separately by territory, with further breakdowns as to weight group and type of handling. The study carriers also supplied certain other data to their cost analyst.

In 1960, a study of the 1959 costs for class I transcontinental motor carriers of general commodities, made by the Commission's Cost Finding Section, was released to the public as statement No. 7-60 (see footnote 8). /This refers to a page not here printed but identified in the accompanying report./ The entire operations of six carriers plus the transcontinental portion of the operations of two others were the basis of that study. Service unit out-of-pocket costs developed in that study for the year 1959 were updated to 1963 in the respondents' study by applying the Highway Form B formula to the 1963 annual reports of the 18 traffic study carriers. Service units and expenses for each carrier were assigned by weight bracket to transcontinental and other traffic in relationship to their participation therein. The accumulation of service units and expenses assigned to transcontinental traffic for all of the traffic study carriers allowed for the development of weighted average unit costs. To permit the trending of these costs to a later period, the carriers participating in the traffic study furnished their cost analyst with a restatement of their labor costs to reflect the impact on the actual 1963 costs of the contractual and contract-related increases known to become effective at the ends of the years 1963, 1964, 1965, and 1966. Similarly, the carriers furnished estimates of increases or decreases in other expenses as of the end of each of these four years. The following table compares the basic service unit out-of-pocket costs of transcontinental traffic for 1959[12] with those developed by the respondents' cost analyst for the year 1963 and yearend 1964.

Out-of-pocket unit costs (cents)

Item	Year 1959	Year 1963		Yearend 1964	
		Amount	Ratio to 1959	Amount	Ratio to 1959
(1)	(2)	(3)	(4)	(5)	(6)
Line-haul cost per vehicle-mile --	35.792	38.023	1.062	38.936	1.087
Line-haul cost per cwt.-mile -----	.13037	.13601	1.043	.13925	1.068
Pickup and delivery cost per cwt. handled----------	18.068	27.549	1.525	28.547	1.580
Platform cost per cwt. handled ---	27.604	35.826	1.225	35.248	1.276
Billing and collecting cost per shipment----------	76.216	87.896	1.153	91.639	1.202

[12] From statement No. 7-60.

On this basis, the respondents' cost analyst computes the operating ratios on transcontinental traffic, based on present revenues and costs at the 1963 and yearend 1964 levels, as 96.2 and 99.1 percent, respectively. An increase of 3 percent in the transcontinental revenues[13] would result in an operating ratio of 96.2 percent at yearend 1964 cost levels. On the basis of his studies, he concluded and testified that from a cost standpoint the general increase of 3 percent in transcontinental rates and charges is fully justified. The traffic study data and the analyst's working papers are not in the record, but in accordance with the Commission's order of August 3, 1964, they were made available to protestants for a period prior to the hearing, and they also were available at the hearing.

At about the same time, the Commission's Bureau of Accounts also was engaged in studies to up-date to 1963 the 1959 territorial costs. In statement No. 7-64,[14] issued in August, 1964, the ratios of unit costs for the first three quarters of 1963 to the corresponding three quarters of 1959, for the class I carriers included in the original transcontinental cost study (statement No. 7-60), were developed. The data in the following table are extracted therefrom.

Out-of-pocket unit costs for cost study carriers for study year brought up to current year level[1]

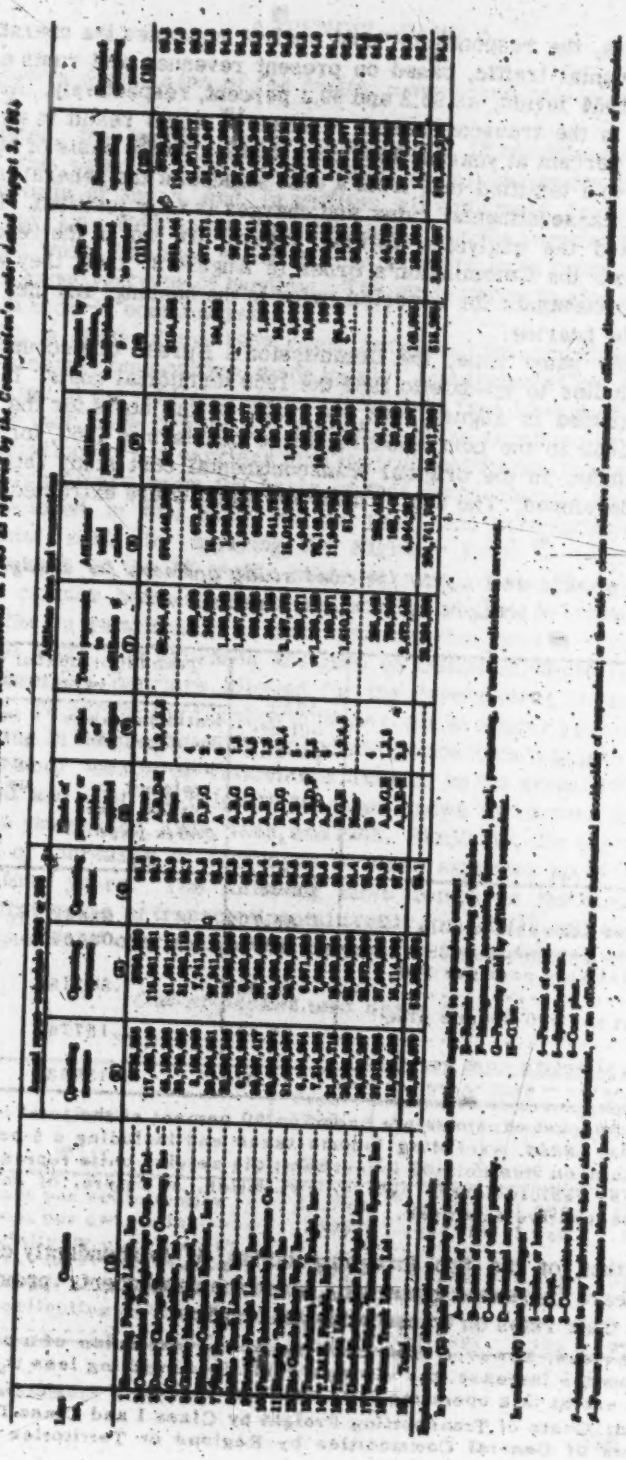
Item	1959 out-of-pocket unit costs	Transcontinental territory year 1963	
		Ratio increase or decrease current year related to study year (work papers)	Study year out-of-pocket costs brought up to current level
(1)	(2)	(3)	(4)
	Cents		*Cents*
Line-haul cost per vehicle-mile	35.792	1.05647	37.813
Line-haul cost per cwt.-mile	.18037	1.09567	37.813
Pickup and delivery cost per 100 pounds	18.068	1.30115	23.509
Platform cost per 100 pounds platformed	27.604	1.15779	31.960
Billing and collecting cost per shipment	76.216	1.13963	86.858

[1]The out-of-pocket expenses are based on 90 percent of the total operating expenses, rents, taxes, excluding income taxes and including a 5-percent allowance for return on depreciated investment; the service units represent the total vehicle-miles, vehicle-hours, cwt. or cwt.-miles, et cetera, of service which caused the respective expenses.

Under either of the two foregoing tables, it is abundantly clear that the unit costs have increased materially since the respondents' previous general increase in their rates on transcontinental traffic.

[13]It is obvious, however, that because of the exclusion of a portion of the territory from the increase, the average would be something less than 3 percent and to that extent this operating ratio would be higher.

[14]Entitled: Costs of Transporting Freight by Class I and Class II Motor Common Carriers of General Commodities by Regions or Territories for the Year 1963.



APPENDIX C

Served February 9, 1967

30356

INTERSTATE COMMERCE COMMISSION

No. 34462

INCREASED CLASS & COMMODITY RATES, TRANSCONTINENTAL

No. 34462

INCREASED CLASS & COMMODITY RATES, TRANSCONTINENTAL

Decided February 1, 1967

Upon reconsideration, findings in prior report, 326 I.C.C. 397, supplemented, clarified, and affirmed.

Appearances shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the instant proceeding approximately 1,400 motor common carrier respondents to tariffs published by the Rocky Mountain Motor Rate Bureau, Inc., filed a general 3-percent increase in their so-called transcontinental rates and charges, with certain exceptions not here material. Upon protest of numerous parties listed in the prior report, 326 I.C.C. 397, Division 2, Acting as an Appellate Division, by order of July 31, 1964, instituted an investigation into the lawfulness of such schedules without suspension of their effectiveness, and they became effective and have remained in effect since August 1, 1964. By order of August 3, 1964, discussed hereinafter, the division required the respondents to submit evidence. Following the submission of further proof, and oral hearing for the purpose of cross-examination, the division by report and order of April 15, 1966, found the increase not shown to be just and reasonable and required the schedules to be canceled and the proceeding to be discontinued. The Division, Acting as an Appellate Division, subsequently denied the respondents' petition for reconsideration, and the schedules were ordered to be canceled as of September 12, 1966. A petition for a finding of general transportation importance was denied by order of the entire Commission on August 24, 1966.

The United States District Court for the District of Colorado in a case entitled *Ringsby Truck Lines, Inc. v. United States*, Civil Action No. 66-C-467, temporarily restrained the effectiveness of the division's order, and in an opinion of January 5, 1967, reversed and remanded the proceeding. The court, noting the apparent departures of the rationale of the division's report from other cases of the Commission, held it was unable to determine the real reasons for the division's decision, including whether the Commission actually changed the standard in this case from judgment sampling to probability sampling, whether it changed its quantum of proof required, whether the Commission simply did not believe the expert witness for the carriers, or whether the Commission concluded that the carriers did not comply with its procedural order of August 3, 1964. It, therefore, held that upon remand "the Commission should explain with some detail exactly how the carriers failed to prove their case and what standards are being applied." It added, that, "if the Commission concludes that the carriers did not disclose sufficient [sic] detailed data, it should explain what type of data it is requiring." The present report is being issued in response to the court's opinion.

At the outset we do not read the court's opinion as standing for the proposition that we may not depart from rationales of prior decisions, or that we may not change the quantum or nature of proof necessary to satisfy the statutory burden of proof upon reasonable notice. The present case, in the court's view, turns on the unclearness of the prior report over whether the division has applied a new standard of proof, particularly in light of the specific references to this proceeding in docket No. 34540, *Motor Carrier Probability Sampling Studies—Forms 2, 4, 7, and 10*, decided September 29, 1966. Much of the court's opinion deals with the question whether the quantum of proof adduced by the carriers was equal to the proof which the Commission has in the past held to be sufficient. The court addresses itself to this question because it does not find any clear indication in the prior report that any new quantum of proof was required by the order of August 3, 1964. The background of this five-page order,[1] issued by the division in numerous proceedings, requires explanation.

[1] A summary of its requirements was set forth in the prior report as part I of the appendix, 326 I.C.C. at 407-408.

Prior to 1962, the Commission approved several general increases, often without detailed investigation. The general increases of the respondent motor carriers generally followed, and in certain ways supported, the increases required by the railroads to maintain their service. See *Transcontinental Motor Rates—Increases*, 49 M.C.C. 211, 213; *Transcontinental and Rocky Mountain Increases*, 54 M.C.C. 377, 378; *Transcontinental and Western Increases, 1952*, 61 M.C.C. 755, 756; *Increases, Transcontinental—Intermountain Coast*, 304 I.C.C. 15, 16–17. We explained the competitive situation of the modes of transportation in *Increased Freight Rates, E., W., and S., Territories, 1956*, 300 I.C.C. 633, 667–68, as follows:

> Whether the railroads will be able to maintain the increases here sought will depend largely upon whether their principal competitors, the motor carriers, make similar increases in their freight rates and charges. The motor carriers are not parties to this proceeding, but obviously their entire rate structure and freight revenues will be indirectly affected by the decision in this case. ***
>
> Railroad executives who testified that total freight revenues would be increased rather than reduced by the proposed increases based their opinion, in part, upon the fact that, in the past, motor-carrier rates have been quickly increased after a general freight rate increase by the railroads. In most cases if the motor carriers do not increase their rates, the railroads will not be able to maintain the increases. This fact is of particular significance when it is realized that the total revenues of the motor carriers subject to our jurisdiction are now more than half as much as those of the railroads subject to our jurisdiction.

The straitened condition of the Nation's railroads generally improved by the 1960's. While approving a general increase of the respondent motor carriers in 1963, we admonished that we were not satisfied with the quantum of evidence produced and stated:

> There is criticism that the respondents' evidence does not reveal in sufficient detail the extent to which their revenues and expenses are related to the transcontinental traffic on which the increases apply, and that some of the carriers providing data do not appear to move a substantial volume of such traffic. *** In the future, studies should be made which reflect the revenues and expenses and their relationship to the specific traffic on which the increases are to apply.

General Increases—Transcontinental, 319 I.C.C. 792, 803. In an earlier proceeding, we stated that once we had typical cost

and revenue evidence we would henceforth require further evidence concerning the appropriate profit level. We specifically recognized that the particular operating ratio (93 percent) relied upon in the past was not an immutable standard and may well have become obsolete. *General Increases—Eastern Central Territory*, 316 I.C.C. 467, 481.[2]

In this context, division 2 (by Commissioner Freas) issued its order of August 3, 1964, in this proceeding. The order required "actual cost and revenue data and operating ratios specifically related to the traffic and territories involved." The order required "detailed data to establish the representative nature of the carriers used," and "in addition all pertinent evidence and supporting data for the individual representative carriers *** specifically relating to the traffic and territories involved," including ratios of income to investment. The order required carrier-affiliate information; and further required:

> That the traffic studies to be submitted shall be based upon actual operations conducted during identical periods of time for each carrier, and the actual cost studies shall be based upon the operations of the same carriers as used in the traffic studies; and that the periods of time selected for, as well as the motor carriers used in, such cost and traffic studies shall be shown to be representative and their selection statistically sound.

We at once note that when the order called for "detailed data," and that "such cost and traffic studies shall be shown to be representative and their selection statistically sound," that the order gave clear notice we would not accept a bare opinion that a particular group of carriers or a study period was representative. The order gave clear notice that we required objective evidence and would carefully decide the reasonableness of the

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[2] The operating ratio, or ratio of expenses to revenues, of 93 percent was first adopted in the 1940's by this Commission. *Increased Common Carrier Truck Rates in the East*, 42 M.C.C. 633, 650; *Middle West General Increases*, 48 M.C.C. 541, 550. Operating ratios even then were not considered the sole standard of revenue need, 48 M.C.C. at 553; and since those years, as noted in the prior report (at 598), there have been "recurring attacks on the use of operating ratios as the principal criterion to justify revenue needs." These general attacks recently culminated in the decision of the entire nine-member Court of Appeals for the District of Columbia Circuit that specific findings and evidence other than bare operating ratios are necessary as a matter of law before an increase in rates may be allowed. *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission*, 350 F. 2d 758 (1965). See also *General Increase—Middle Atlantic & N. Eng. Ter.*, 319 I.C.C. 168, 176-77; *LTL COR Rates Between East and Territories West*, 328 I.C.C. 174, 202.

opinion evidence of experts and consider the "force of their reasoning."[3]

Of course, respondents had never presented a witness' "judgment sample" of representative carriers in any past increase proceeding; nor had we relied on such opinions, unsupported by other evidence, in a general increase case. We required some further showing. For example, in *General Increases—Eastern Central Territory*, 316 I.C.C. 467, the carriers used a judgment sample that was shown to embrace 80 percent of the same carriers' revenues in the considered territory, and the study was readily reconciled with their reported data (at 471). Other objective tests of the sample were made available to us. The percentage distribution of the traffic for single-line and interline traffic was similar as between the traffic study and those carriers' annual reports to the Commission (at 494). Moreover, it was considered persuasive that the cost study carriers' participation in the considered traffic was over 66 percent of their total traffic (at 493).

A judgment sample can be made subject to objective tests and data that would show whether it is representative. If carriers seeking increased rates are grouped by relative size, a judgment sample adequately reflects the entire group, if it is shown that all sizes are reasonably represented. If carriers are grouped by relative efficiency (*e.g.*, according to their operating ratios), a judgment sample of such carriers must likewise be shown to reflect the characteristics of the entire group. If the figures are weighted, the witness must show why it is reasonable to permit the larger carrier to determine the outcome in the circumstances of that case.

In *LTL COR Rates—Between East and Territories West*, 326 I.C.C. 174, 197, we described further tests of a judgment sample that are available to an expert witness. A random sample may be taken of the remaining carriers, and the witness may either show that the remaining carriers are not significantly different from the study carriers, or if the remainder differ, apply the proper weights from the probability sample to correct for the differences.

In *Motor Carrier Probability Sampling Studies, Forms 2, 4, 7 and 10, supra*, we adhered to a prior judgment selection of carriers to participate in certain special studies only upon finding

[3] Under the ruling of *Market Street R. Co. v. Comm'n.*, 324 U.S. 548, 560-61 (1945).

that we were concerned with sampling only this particular universe, or group of carriers, *all* of whom were included. We specifically found, "Given this universe, no statistical bias will exist so long as no carriers are excluded" (page 15). The discussion concerned the proper definition of the total group of carriers under study (the universe), rather than the proper method for sampling the universe or for testing the sample. That report does not require random sampling in all cases and does not govern here.

The sample of carriers in the present proceeding do not meet the standards of proof set forth in the order of August 3, 1964. No objective tests of the sample were made, and no objective data were presented on this record to support the sample. As the court notes, the evidence consisted entirely of the opinion of one witness and the statements of company officials. The expert explained his choice on cross-examination in terms of, (1) his sample carriers "perform the principal transcontinental transportation;" (2) "by working with a numerically small group of carriers it was possible" to reflect both originating and interline traffic; and (3) the group produces "a substantial picture of the transportation characteristics of the transcontinental traffic."

No data was introduced to support these opinions, nor any showing made that the choice of carriers was statistically sound. His reasoning was not persuasive. The last two reasons apply to any sample and do not support the particular sample carriers chosen here. The first reason is not borne out by the record; there is no showing (1) of what proportion of the total transcontinental motor carrier traffic, participated in by 1,400 carriers, is handled by the 18 study carriers, or (2) that the study carriers perform the "principal" transcontinental transportation. The participation in this traffic is shown for 12 carriers without any data or reasons why these figures on participation prove an adequate sample. The cost study does not take into account the relative participation in transcontinental traffic of six carriers.

Eight of the carriers chosen by respondents for study were also studied by our staff in Statement No. 7-60. The inclusion of these eight carriers in respondents' study is not persuasive, since the staff study is limited to long-haul traffic, whereas the traffic that will bear the increase is both long-haul and short-haul.

Even if we were to assume that the study carriers were representative, we must nevertheless conclude that respondents did not prove that the period studied was typical and statistically sound, as required by the order of August 3, 1964. Respondents' witness chose the "earliest possible dates for which the carriers could organize themselves." When the witness further stated that a week was taken for truckload traffic "in the middle of June to avoid peaks in traffic," the same reason would seem to apply to less-than-truckload traffic, but only 1 day was used for the latter. No objective test of the typicality of those dates was made to show they were statistically sound.

A third ground for finding that respondents did not meet their statutory burden of proof is their failure, although given notice under the express terms of the August 3, 1964 order, that we required "evidence and supporting data" justifying the amount of profit they wished to earn over and above their operating costs. The order required operating ratio evidence, and "all pertinent evidence and supporting data" regarding the rate of return "specifically relating to the traffic and territories involved."

The respondents presented no evidence of the rates of return the study carriers, or any other carriers, had earned, or would earn (with or without the increase), on the traffic that would bear the increase in the territories involved. The rate of return evidence was shown for the overall operation of the study carriers. The evidence, therefore, does not show us what returns would be made by the carriers on the traffic that would bear the increase. Of course, even if the carriers had presented these figures, their evidence would still be deficient under the standards of proof laid down by the Court of Appeals in the *D. C. Transit System, Inc., supra*, whether the carriers relied upon operating ratio or rate of return as the ultimate test of a fair profit.

The present decision admittedly departs from the standards employed in earlier years concerning the quantum of evidence that would justify an increase in rates. The August 3, 1964, order gave fair notice of this departure; and the witnesses that appeared for respondents were admittedly aware that the August order, consistent with earlier admonitions, laid new ground rules for this general increase proceeding. If respondents had required more time to prepare their case, an appropriate remedy was available to them.

The order of August 3, 1964 is not unique to this case, nor is our dissatisfaction with the presentation made by the respondent

motor carriers. We have applied the standards of the August 3, 1964, order consistently in other cases since about 1963,[4] and we strongly believe that a need for additional revenue through increased rates of motor carriers requires no less a showing than we have prescribed.

Addressing ourselves to the specific questions raised by the court in its opinion, we find, (1) the Commission has not changed the standard in this case from judgment sampling to probability sampling, but rather requires that any judgment sample be supported by adequate objective tests and data showing that it is representative, which respondents have failed to do; (2) the quantum of proof necessary to support an increase in motor carrier rates is different and heavier than in the years prior to 1963, as set forth in decisions in and after 1963, and in specific detail in the order of August 3, 1964, in the present proceeding; and (3) the respondents' increases are disapproved, not for failure to present a credible witness or merely for failure to comply with a procedural order, but for failing to sustain their burden of proof with the type of evidence of which they were given notice. We have shown wherein the carriers failed to prove their case, and what standards apply, including the type of objective tests of a judgment sample that can be introduced to support such a sample.

We affirm the finding of the prior report that the 3-percent general increase is not shown to be just and reasonable.

COMMISSIONER GOFF, whom COMMISSIONER WALRATH joins, dissenting:

The increase has been in effect for 21/2 years. It is common knowledge that costs and prices have gone up significantly in that time. Moreover, we all know the industry is currently faced with another round of substantial wage increases. In elemental fairness I would not now require cancellation of the 3-percent increase. Instead I feel we should reopen the proceeding to afford respondents an opportunity to supply the deficiencies in their case on the record. Also, in these days of rapidly mounting costs the evidence for 1963 is stale.

[4] *E.g., General Increases, Between East and Territories West*, Docket No. I. & S. M-18827, decided November 8, 1965; *LTL COR Rates—Between East and Territories West*, 326 I.C.C. 174; *Increased Rates, Southwest, Colorado, Wyoming*, 326 I.C.C. 216.

COMMISSIONER DEASON, dissenting:

The 3-percent general increase in rates which the majority has ordered canceled in this report has now been in effect 2 1/2 years. Because of parallel increases in wages and other costs during this period, an updated record on further hearing could probably justify the higher rates. What I find particularly disturbing here is the majority's reluctance to give respondents the opportunity to overcome the division's objections to their cost study while these schedules remain in force.

As I see it, the Commission has an affirmative role, within the framework of the act and the national transportation policy, to exercise a full measure of discretion and latitude in dealing with all problems that come before it. In my opinion, the majority's refusal to reopen this proceeding falls considerably short of that mission.

It is ordered, That the above-entitled proceeding is hereby reopened for reconsideration on the record as made;

It is further ordered, That for the reasons set forth in the above report the respondents herein are hereby notified and required to cancel on or before March 10, 1967, the schedules described in the order entered on July 31, 1964, by Division 2, Acting as an Appellate Division, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act;

It is further ordered, That since the remand of the United States District Court for the District of Colorado occasions this report and order, the compliance date of March 10, 1967, shall be stayed and postponed, if the Office of the Secretary or the Office of the General Counsel is served with a further complaint by one or more respondents in that or another court before such date, which postponement shall continue pending such further review proceedings.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

(SEAL)

H. NEIL GARSON,
Secretary.

APPENDIX D

Findings of Fact and Conclusions of Law on Application for Temporary Injunction

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-65 Civil Action 285

MIDDLEWEST MOTOR FREIGHT BUREAU, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

and

THE NATIONAL SMALL SHIPMENTS
TRAFFIC CONFERENCE, INC., et al.,
Intervenors,

and

WISCONSIN MANUFACTURERS ASSOCIATION,
Intervenors.

This cause came on for hearing before this three-judge Court on September 24, 1965, upon motion by plaintiffs for an interlocutory injunction. Plaintiffs appeared by Harold C. Evarts, Esq., George D. Michalson, Esq., and Roland Rice, Esq. Defendants appeared by Sidney P. Abramson and Neil F. Convery, Assistant United States Attorneys for the District of Minnesota. The Interstate Commerce Commission

appeared by Robert S. Grisvold, Esq. Intervenors Wisconsin Manufacturers Association appeared by Philip H. Porter, Esq. All other intervenors appeared by John J. C. Martin, Esq., Larry R. Henneman, Esq., and Michael P. Sullivan, Esq.

The Court having heard the arguments of counsel, having considered the affidavits submitted, on all the files, records and proceedings herein makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

This is a proceeding to review the determination of the Interstate Commerce Commission (hereinafter referred to as "The Commission") in the proceeding designated as I and S Docket M-17450, *LTL Class Rates & Minimum Charges Between Midwest and Central Territories,* wherein the Commission determined that certain schedules for increases in less-than-truckload class rates and minimum charges filed with the Commission were "not shown to be just and reasonable." Those schedules established increased rates and charges on class-rated, less-than-truckload shipments between, to, and from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming. By stipulation of the parties concerned, the Commission's order also embraces such rates and charges on shipments moving between Iowa, Michigan, Minnesota, Nebraska, North

Dakota, South Dakota, and Wisconsin on the one hand, and Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee, and Texas on the other hand. Such schedules became effective on July 1, 1963. By Order of the Commission, Board of Suspension dated June 26, 1963, such schedules were suspended. By Order of the Commission dated August 8, 1963, the said order dated June 26, 1963, was vacated and set aside as of September 7, 1963. By report and order dated February 24, 1965, the Commission ordered the scheduled increases to be cancelled finding "that the proposed increases are not shown to be just and reasonable." By subsequent orders the Commission postponed the date for compliance with the report and order of February 24, 1965, to September 13, 1965.

II

The Middlewest Motor Freight Bureau is a corporation organized under the laws of the State of Missouri and is a trade association and tariff publishing agent for some 1,200 motor common carrier members including the motor carrier plaintiffs herein.

III

On September 9, 1965, the United States District Court for the District of Minnesota made its temporary restraining order restraining and enjoining the Interstate Commerce Commission from enforcing its said order of February 24, 1965, and thereafter modified by subsequent orders, and suspending the operation of said order of February 24, 1965. On September 20, 1965, after noticed hearing on September 16

and 17, 1965, said Court made its order extending said temporary restraining order pending a determination of plaintiffs' motion for interlocutory injunction.

IV

On September 24, 1965, this three-judge Court heard and considered the arguments of counsel relative to plaintiffs' motion for an interlocutory injunction.

V

Plaintiffs contend that the report and order of the Commission dated February 24, 1965, is unlawful on various grounds, such as being unsupported by the evidence, arbitrary, capricious, and an abuse of discretion, and that the Commission's findings represented an ex post facto application of revised standards as to the nature of the evidence required to justify the rate increases, but the plaintiffs primarily urge that their showing before the Commission justified a finding that, without the proposed increase, the operating ratio of many, if not most, of the carriers involved, would exceed 93 per cent, which the Commission had theretofore found to be reasonable.

VI

The Commission found that the evidence before it submitted by the carrier plaintiffs was of little probative value to support the proposed operating rates submitted to it, and on the hearing before this Court on the motion for an interlocutory injunction, this Court finds that the plaintiffs have failed to establish

by any persuasive showing that the Commission had done anything more in applying new standards to the record submitted, than to scrutinize with greater care the surveys which the carriers had promulgated in support of the proposed increased rates.

VII

This Court further finds on the showing before it

(a) That plaintiffs had reasonable notice of the alleged new standards which the Commission allegedly promulgated and which pertained to the degree of proof necessary to sustain the surveys made by the carriers in support of the proposed increase of rates.

(b) That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates.

(c) That the balancing of the equities in considering the magnitude of the losses and injury to the public if the interlocutory injunction is granted and if the Commission's order is sustained by the Court, as compared with the losses to the carriers if the injunction is not granted, with the remote possibility of the Commission's order being set aside, adequately justifies this Court, on this showing, in denying the motion for an interlocutory injunction.

(d) That plaintiffs have failed to convincingly demonstrate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable.

Conclusions of Law

1.

The plaintiffs are not entitled to an interlocutory injunction, and plaintiffs' motion therefor should be and hereby is denied.

2.

The temporary restraining order herein dated September 9, 1965, as extended by order dated September 20, 1965, should be and hereby is dissolved.

Dated this 29 day of September, 1965.

Harry A. Blackmun
Harry A. Blackmun
United States Circuit Judge

Edward J. Devitt
Edward J. Devitt
United States District Judge

Gunnar H. Nordbye
Gunnar T. Nordbye
United States District Judge